



1987

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Recommended Citation

Kerry A. McHugh, *Product Disparagement: Expanding Liability in Texas*, 41 Sw L.J. 1203 (1987)
<https://scholar.smu.edu/smulr/vol41/iss5/6>

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PRODUCT DISPARAGEMENT: EXPANDING LIABILITY IN TEXAS

by Kerry A. McHugh

THE economic and financial welfare of manufacturers and sellers depends upon the quality and reputation of their products. A company's quality products create and maintain the goodwill of its customers towards the company. That goodwill generates sales revenues for the company and often comprises a substantial portion of the company's total value.

Statements criticizing the quality of a product, therefore, often cause pecuniary losses to the manufacturer and seller of the product in the form of lost sales and lost goodwill. Because modern media technology enables statements to be communicated to a large number of people in a short amount of time, statements that disparage a product have a significant effect. In some instances, companies are forced to go out of business because consumers are unwilling to purchase their products based on reports that the products are defective or of low quality.

When disparaging statements about a company's product are false, the company may seek to recover for the pecuniary losses it sustained as a result of the false disparagement. Many jurisdictions grant a cause of action to manufacturers and sellers who suffer financial or economic injuries because of others' false disparagement of their products. Plaintiffs often bring these actions as product disparagement or trade libel claims.

This Comment analyzes the issue of product disparagement liability under Texas law. Section I of this Comment outlines the historical development of product disparagement and notes the differences between disparagement and defamation actions. With this explanation of the law of product disparagement as a background, section II discusses the current state of the law in Texas and addresses the question of whether Texas recognizes a cause of action for product disparagement. Finally, section III presents recommendations to the Texas Supreme Court for the expansion and clarification of product disparagement law.

I. DEVELOPMENT OF PRODUCT DISPARAGEMENT

A. *Disparagement Contrasted with Defamation*

Product disparagement is a tort within the class of "injurious falsehood."¹

1. Sir John Salmond coined the term "injurious falsehood." W. Prosser & W. KEETON

Injurious falsehood includes actions for slander of title,² business or commercial disparagement,³ disparagement of goods or property,⁴ disparagement of the quality of goods or property,⁵ and trade libel.⁶

Actions for product disparagement differ from actions for defamation. Although both torts provide a remedy for injuries sustained as a result of the

ON THE LAW OF TORTS § 128, at 964 (W. Keeton ed. 1984) [hereinafter PROSSER & KEETON] (citing J. SALMOND, LAW OF TORTS § 151 (10th ed. 1945)).

2. A slander of title action arises when someone makes malicious or damaging oral or written statements regarding the plaintiff's title to, or interest in, real or personal property and thereby causes the plaintiff to be unable to sell or lease the property. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425, 425-26 (1939) [hereinafter Prosser, *Injurious Falsehood*] (discussing development of disparagement of title or interest); see also Hibschan, *Defamation or Disparagement?*, 24 MINN. L. REV. 625, 627-28 (1940) (comparing slander of title to property disparagement). Early slander of title actions usually involved a defendant's statement that the plaintiff did not hold legal title to the land he offered for sale. *Kendall v. Stone*, 5 N.Y. 14, 18 (1851). See generally G. BOWER, *Actionable Defamation* 209 n.1 (2d ed. 1923) (discussing origin of slander of title); Smith, *Disparagement of Property*, (pts 1 & 2), 13 COLUM. L. REV. 13, 121 (1913) (discussing development of disparagement of title or interest). Although termed a "slander," the action for slander of title was not a defamation tort, but an action on the case. Prosser, *Injurious Falsehood*, *supra*, at 425. An action on the case differed at common law from an action for trespass. A trespass action could be against the defendant whose wrongful acts caused direct and immediate damage to the plaintiff's property. An action on the case, however, provided a remedy to the plaintiff who suffered property injuries indirectly and consequentially because of the defendant's acts. See *Scott v. Shepherd*, 96 Eng. Rep. 525 (Com. Pl. 1773).

The association of injurious falsehood with defamation and slander, however, has affected the development of injurious falsehood actions. Prosser, *Injurious Falsehood*, *supra*, at 427. "[A]n aura of slander has hung over it [injurious falsehood] like a fog, obscuring its real character; and this has had far too much influence upon its development. The plaintiff's title, or property, has come to be regarded as somehow personified, and so defamed." *Id.*

3. Business or commercial disparagement usually involves a defendant's statement regarding the plaintiff's business itself as distinct from the plaintiff's products and from the plaintiff, who is the owner of the business. Hibschan, *supra* note 2, at 628-31. Business disparagement should not be confused with libel of a corporation. The former is a form of injurious falsehood, while the latter is a defamation action brought by a corporate "person" as the owner of the business. See Note, *Libel and The Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1498-1500 (1969). A corporate entity lacks a personal reputation so that statements will not personally defame the entity, but statements about the entity's business may be defamatory. *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377, 381 (5th Cir. 1967) (applying Florida law since publication occurred in that state); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 982-83 (D. Ore. 1963); *Life Printing & Publishing Co. v. Field*, 324 Ill. App. 254, 58 N.E.2d 307, 310 (1944); *Hotel & Restaurant Employees & Bartenders Int'l Union v. Zurzolo*, 142 Ind. App. 242, 233 N.E.2d 784, 790-91 (1968); *Axton Fisher Tobacco Co. v. Evening Post Co.*, 169 Ky. 64, 77, 183 S.W. 269, 274 (1916); see Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 964-67 (1975) [hereinafter Note, *Corporate Defamation*].

4. The tort of disparagement of goods or property developed from the tort of slander of title. Hibschan, *supra* note 2, at 628; Wham, *Disparagement of Property*, 211 ILL. L. REV. 26, 26-27 (1926).

5. Actions for disparagement of the quality of goods or property are within the tort of product disparagement. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 547-50, 216 Cal. Rptr. 252, 254-56 (1985).

6. Many cases use trade libel to refer to product disparagement. Like slander of title, trade libel is a form of disparagement rather than of defamation, despite the inclusion of the terms "libel" and "slander" in their names. *Id.* at 547-49; 216 Cal. Rptr. at 254-56; *Albertini v. Schaefer*, 97 Cal. App. 3d 822, 826, 159 Cal. Rptr. 98, 100 (1979); *Erlich v. Etnier*, 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256, 258-59 (1964); *Shores v. Chip Steak Co.*, 130 Cal. App. 2d 627, 630, 279 P.2d 595, 597 (1955).

publication of false statements, each tort protects a different interest.⁷ Defamation actions lie only when the false statements injure the personal reputation of the plaintiff.⁸ Disparagement actions, however, arise whenever such statements harm the business interests of the plaintiff and result in pecuniary losses.⁹

Although disparagement and defamation constitute distinct torts,¹⁰ many cases involve statements that disparage a plaintiff's property or product and also defame the plaintiff's character or reputation.¹¹ Accordingly, if the statement indicates that the plaintiff is dishonest or lacks integrity,¹² is in-

7. *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 408-09 (E.D. Pa. 1983); *Polygram Records*, 170 Cal. App. 3d at 549, 216 Cal. Rptr. at 255; *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 904 (1971); *Hibschman*, *supra* note 2, at 633-34; *Prosser, Injurious Falsehood*, *supra* note 2, at 427; *see Wham*, *supra* note 4, at 27-29; Note, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 YALE L.J. 65, 74-75 (1953); *see also* RESTATEMENT (SECOND) OF TORTS § 623A comment g (1977) [hereinafter RESTATEMENT] (the tort of defamation protects personal reputations while the tort of disparagement protects economic interests only).

8. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220, 224 (1986). The elements of a cause of action for defamation include "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." RESTATEMENT § 558, at 155. A statement "is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* § 559, at 156; *see Dairy Stores*, 516 A.2d at 224.

Actionable defamation requires personal injury to the reputation of another person. PROSSER & KEETON, *supra* note 1, § 111, at 773-74. A plaintiff in a defamation action may, however, recover damages for pecuniary loss resulting from injury to his personal reputation. *Id.* § 116A, at 844. Defamatory statements tend "to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held or to excite adverse, derogatory or unpleasant feelings or opinions against him." *Id.* at 773. Defamation involves the concept of disgrace. *Id.* A defendant who defames another and thereby injures not only the personal reputation, but also the economic interests of another is liable for pecuniary loss resulting to the other if "(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless of its truth or falsity." RESTATEMENT § 623A, at 334; *see Hibschman*, *supra* note 2, at 628-34. For a discussion of the special damages requirement and of losses recoverable in disparagement actions, *see infra* notes 50-60 and accompanying text.

9. For a list of the elements of product disparagement, *see* text accompanying *infra* note 37. Disparagement and other injurious falsehoods are forms of tortious interference with economic relations. *Dairy Stores*, 516 A.2d at 224; *Green, Relational Interests*, 30 ILL. L. REV. 1, 37-43 (1935). *See generally* 2 F. HARPER, F. JAMES & O. GREY, LAW OF TORTS § 6.1 (2d ed. 1986) (discussing product disparagement as offshoot of cause of action for interference with contractual relations). Product disparagement is a form of unfair interference with economic relations in which the defamation of the plaintiff is merely incidental to the disparagement of his product. *Royer v. Stoodly Co.*, 192 F. Supp. 949, 951-54 (W.D. Okla. 1961).

10. *Menefee v. Columbia Broadcasting Sys., Inc.*, 458 Pa. 46, 52-53, 329 A.2d 216, 219-20 (1974). *Compare supra* note 8 (setting forth elements of defamation) with *infra* text accompanying note 37 (listing elements of disparagement).

11. *Dairy Stores*, 516 A.2d at 224 (citing PROSSER & KEETON, *supra* note 1, § 128, at 964-65). A statement that disparages a plaintiff's product may also imply defamation of the plaintiff manufacturer or owner of the business. PROSSER & KEETON, *supra* note 1, § 128, at 964-65.

12. Statements that indicate that the plaintiff is dishonest or that he lacks integrity give rise to a cause of action for defamation rather than for disparagement. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 270-71 (3d Cir. 1980); *Erlich v. Enter*, 224 Cal. App. 2d 69, 72, 36

competent,¹³ is fraudulent or deceitful,¹⁴ or has any other reprehensible characteristic,¹⁵ the plaintiff has a cause of action for defamation.¹⁶

Larsen v. Brooklyn Daily Eagle represents one of the earliest important cases involving defamation by product disparagement.¹⁷ In *Larsen* a newspaper article alleged that ice cream manufactured by Larsen contained harmful ingredients. The article stated that the ice cream caused the death of one child and severe illness in four other children. The New York Court of Appeals acknowledged that the harmful ingredients could have contaminated the ice cream as a result of a single accident without the manufacturer's knowledge or evil intent.¹⁸ According to the court, however, readers of the article might infer that the manufacturer was dishonest and deceitful because the contamination of the ice cream caused injuries to numerous children.¹⁹ The court ruled, therefore, that the statements were defamatory with respect to Larsen personally.²⁰

Statements that do not impute to the plaintiff a lack of honesty or integrity, in contrast, do not constitute actionable defamation. *General Market Co. v. Post-Intelligencer Co.*,²¹ another significant early case, involved an article asserting that the Washington State Department of Agriculture de-

Cal. Rptr. 256, 258 (1964); *Larsen v. Brooklyn Daily Eagle*, 165 A.D. 4, 150 N.Y.S. 464, 465 (1914).

13. Statements implying that the plaintiff lacks skill or competence in his trade or business are defamatory of the plaintiff. *Holland v. Flick*, 212 Pa. 201, 61 A. 828, 829 (1905).

14. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 269 (7th Cir. 1983) (citing *Continental Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395, 397 (7th Cir. 1965)); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 271 (3d Cir. 1980); see *supra* note 12.

15. Statements that impute criminal conduct to the plaintiff constitute actionable defamation. *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 695 (D.N.J. 1985); *Molnar v. Star-Ledger*, 193 N.J. Super. 12, 17-18, 471 A.2d 1209, 1212 (Super. Ct. App. Div. 1984); *Pfeifely v. Henry*, 269 Pa. 533, 112 A. 768, 769 (1921).

16. *Polygram Records v. Superior Court*, 170 Cal. App. 3d 543, 550, 216 Cal. Rptr. 252, 256 (1985); *accord Steaks Unlimited*, 623 F. Supp. at 271; *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 767 (8th Cir. 1927); *Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories*, 17 F.2d 255, 258 (8th Cir. 1926); *Dairy Stores*, 516 A.2d at 224; *Erllich v. Enter*, 224 Cal. App. 2d 69, 72, 36 Cal. Rptr. 256, 258 (1964); *Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 N.Y.2d 460, 174 N.E.2d 602, 603-04, 214 N.Y. S.2d 725, 727-28 (1961); *White v. Hanks*, 255 S.W.2d 602, 603 (Ky. 1953); *Larsen v. Brooklyn Daily Eagle*, 165 A.D. 4, 150 N.Y.S. 464, 465-66 (1914). In theory, the plaintiff may sue and recover for both product disparagement and personal defamation. *Kollenberg v. Ramirez*, 127 Mich. App. 345, 339 N.W.2d 176, 178-79 (1983). If damages are duplicated, however, the plaintiff may not recover for both torts. 339 N.W.2d at 179; see *Georgia Soc'y of Plastic Surgeons v. Anderson*, 257 Ga. 710, 363 S.E.2d 140, 143-44 (1987) (declining to determine whether Georgia recognizes actions for trade libel, but holding that damages awarded for trade libel or personal defamation would constitute impermissible double recovery when plaintiffs also recovered for unfair trade practices). Thus, when a court finds that a statement disparaged the plaintiff's product and also personally defamed the plaintiff, it will proceed on the defamation theory alone because the plaintiff may recover for economic injury as well as for emotional suffering under the defamation action. See *supra* note 8. Moreover, the defamation action requires the plaintiff to make fewer showings than does a disparagement claim. See *supra* note 8 and text accompanying *infra* note 37 and accompanying text.

17. 150 N.Y.S. 464 (1914).

18. *Id.* at 466.

19. *Id.*

20. *Id.* at 466-67.

21. 96 Wash. 575, 165 P. 482 (1917).

stroyed General Market's food products because they were unfit for consumption. The Washington Supreme Court held that the article was not libel per se, despite the fact that the article specifically named General Market in both the headline and the text.²²

In a similar case, which involved disparagement of the quality of a caterer's food, a Massachusetts court held that statements criticizing the food, cigars, and wine that a caterer served at a dinner were not defamatory of the caterer, but merely disparaged the dinner it served.²³ *Marlin Firearms Co. v. Shields*²⁴ also involved disparagement of the quality of another's goods. In *Marlin Shield's* magazine published sham letters that it purported to have received from its readers, criticizing Marlin guns.²⁵ The Court of Appeals of New York held that the letters did not defame Marlin but merely disparaged the guns themselves.²⁶ The court stated that words disparaging a product are not defamatory as to the manufacturer unless they imply that the manufacturer is guilty of deceit in manufacturing or selling the product.²⁷ If, however, disparaging statements regarding a product directly attack the honesty, integrity, or capability of the manufacturer, the statements constitute libel of the manufacturer.²⁸

In *Polygram Records v. Superior Court*²⁹ a California appeals court thoroughly reviewed the laws of disparagement and defamation in California.³⁰ The *Polygram* case involved a joke told by a comedian during a live performance and on audio and video tapes. David Rege, owner of Rege Wine Cellars, filed suit against the comedian, alleging that the joke referred to Rege personally and to Rege brand wines. After an extended discussion of the nature of comedy and parody,³¹ the *Polygram* court rejected Rege's theory that the joke personally defamed him and disparaged his products by associating them with blacks.³² The court stated that to permit recovery in such a case would be repugnant to constitutional values that prohibit racial discrimination.³³ Furthermore, the court stated that the joke was impossible for any sensible person to take seriously.³⁴

22. 165 P. at 483-84.

23. *Dooling v. Budget Publishing Co.*, 144 Mass. 258, 10 N.E. 809, 811 (1887). The article stated that the caterer served "a wretched dinner . . . in such a way that even hungry barbarians might justly object." 10 N.E. at 809.

24. 171 N.Y. 384, 64 N.E. 163 (1902).

25. The letters specifically asserted that Marlin rifles had defective extractors and ejectors. One letter contained a paragraph allegedly excerpted from the catalogue of a reputable gun dealer stating that the dealer refused to recommend or guaranty Marlin rifles. The excerpt further asserted that the dealer would not accept liability if the Marlin rifles "chew[ed] up the heads of cartridges" or "clog[ged] up." 64 N.E. at 163.

26. *Id.* at 164.

27. *Id.* (citing *Tobias v. Harland*, 4 Wend. 537 (1862)).

28. *Id.*

29. 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985).

30. *Id.* at 548-55, 216 Cal. Rptr. at 254-60.

31. *Id.* at 551-55, 216 Cal. Rptr. at 257-60.

32. *Id.* at 557-58, 216 Cal. Rptr. at 261-62.

33. *Id.*

34. *Id.* at 556-57, 216 Cal. Rptr. at 260-61; see, e.g., *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438, 443 (1985) (no reasonable reader could reasonably believe statements in sexual-humor article); *Yorty v. Chandler*, 13 Cal. App. 3d 467, 475, 91 Cal. Rptr. 709, 713 (1970)

As this discussion indicates, courts addressing product disparagement and defamation causes of action tend to approach the issues on a case-by-case basis. Consequently, the decisions within and among certain jurisdictions diverge in rationale and result.³⁵ Similar facts and circumstances often have produced dissimilar results.³⁶ Because courts find it difficult to determine whether a particular statement gives rise to a cause of action for defamation or for disparagement, their decisions have failed to provide future courts with a clear guideline for making the same distinction.

B. Elements of a Cause of Action for Product Disparagement

The elements of a cause of action for product disparagement include: (1) the publication of matter derogatory to the plaintiff's product or the quality of the product, (2) falsity of the publication or statement, (3) malice, or intent to prevent others from dealing with the plaintiff or from purchasing its products or otherwise to interfere with the plaintiff's relations with others to its disadvantage, and (4) special damages in the form of pecuniary loss.³⁷

The first element of a cause of action for product disparagement involves several distinct showings. First, the plaintiff must prove publication or communication of the statement to a third person.³⁸ Second, the plaintiff must

(political cartoon could not be deemed defamatory as serious statement of fact); *Blake v. Hearst Publications Inc.*, 85 Cal. App. 2d 6, 11, 170 P.2d 100, 103 (1946) (cartoon "extremely distasteful" to plaintiff held not defamatory). The *Polygram* court implied that the facts failed to indicate that the allegedly defamatory and disparaging statements could be understood to refer to Rege and Rege wine. *Polygram*, 170 Cal. App. 3d at 556-57, 216 Cal. Rptr. at 260-61. A plaintiff in either a defamation action or a disparagement action must show that the statement referred to him or his product, respectively. See *infra* notes 230-33 and accompanying text. For a discussion of this requirement with respect to fictitious characters, see *infra* note 42.

35. *Polygram*, 170 Cal. App. 3d at 548-50, 216 Cal. Rptr. at 254-55. Compare *Larsen v. Brooklyn Daily Eagle*, 150 N.Y.S. 464 (1914) (statements that ice cream contained harmful ingredients defamatory of manufacturer) and *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 271 (article reporting plaintiff's meat was low quality, commercial grade steak defamed meat packer) with *General Market Co. v. Post-Intelligencer Co.*, 96 Wash. 575, 165 P. 482 (1917) (report that agriculture department destroyed plaintiff's food product because it was inedible did not defame plaintiff) and *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 334 N.Y.S.2d 325, 329-30 (Sup. Ct. 1972) (food and service review on plaintiff's restaurant and other similar restaurants describing food as "mostly all fake food, ground up schmutz" did not defame plaintiff).

36. See *infra* note 35.

37. See *Aetna Casualty and Surety Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988) (citing *Polygram*, 170 Cal. App. 3d at 548-49, 216 Cal. Rptr. at 255); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 409 (E.D. Pa. 1983) (citing RESTATEMENT § 623A); *General Prod. Co. v. Meredith Corp.*, 526 F. Supp. 546, 553 (E.D. Va. 1981); *Menefee v. Columbia Broadcasting Sys., Inc.*, 458 Pa. 46, 53, 329 A.2d 216, 220-21 (1974); PROSSER & KEETON, *supra* note 1, § 128, at 967-70.

38. *Zerpol*, 561 F. Supp. at 509. Because an action for product disparagement is analogous to an action for interference with commercial relations, see PROSSER & KEETON, *supra* note 1, § 128, at 964, see Green, *supra* note 9, at 37; PROSSER & KEETON, *supra* note 1, § 128, at 964, and requires an allegation and proof of special damages, see *infra* notes 50-60 and accompanying text, the action necessarily requires the publication or communication of statement to a third person. Defamation encompasses the torts of libel and slander. *Western Commerce Bank v. Reliance Ins. Co.*, 105 N.M. 346, 732 P.2d 873, 875 (1987); see PROSSER & Keeton, *supra* note 1, § 112, at 785. Libel is written defamation, whereas slander is oral defamation. *Western Commerce Bank*, 732 P.2d at 875. The distinction between oral and written

show that the statement was disparaging in nature.³⁹ Statements giving rise to a cause of action may either explicitly or implicitly disparage a plaintiff's product.⁴⁰ Finally, the plaintiff must establish that the disparaging publication actually referred to the plaintiff's product.⁴¹ The test is whether third parties understood the statements to refer to the plaintiff's product.⁴²

statements, however, does not carry over into the law of disparagement. *Polygram*, 170 Cal. App. 3d 643, 649, 216 Cal. Rptr. 252, 255 (1985). A communication need not be in writing to support a valid claim for product disparagement. *Id.*

39. *Compare* Chemical Corp. of Am. v. Anheuser-Busch, Inc., 306 F.2d 433, 437-38 (5th Cir. 1962) (though not analyzed in terms of product disparagement, slogan used by manufacturer of floor wax containing insecticide, "Where there's life . . . there's bugs," held to deceive public to detriment of Anheuser-Busch and its beer advertisement slogan, "Where there's life . . . there's Bud,") with *Anheuser-Busch, Inc. v. Florists Ass'n*, 603 F. Supp. 35, 40 (N.D. Ohio 1984) (florists' use of slogan, "This Bud's For You," to promote "something as wholesome, delectable, and appetizing as a dewy rosebud" held not to disparage Anheuser-Busch's slogan or its product, Budweiser beer). See Note, *supra* note 7, at 77.

40. *Compare* Erick Bowman Remedy Co. v. Jensen Salsberg Laboratories, Inc., 17 F.2d 255, 256-57 (8th Cir. 1926) (defendant explicitly stated that Bowman's animal medicine was composed only of brown sugar and bran and that state was taking action against Bowman) with *Lawrence Trust Co. v. Sun-American Publishing Co.*, 245 Mass. 262, 139 N.E. 655, 656 (1923) (Sun-American published editorials stating that Lawrence Trust's business and creditworthiness were failing and implied that its officers were untrustworthy) and *Pendleton v. Time, Inc.*, 339 Ill. App. 188, 89 N.E.2d 435, 438 (1940) (*Life* magazine's false assertion that portrait it published was first ever painted of Harry S. Truman impliedly disparaged genuineness of first portrait). The jury may infer that a statement is derogatory in nature. See Note, *supra* note 7, at 77-78.

41. See *National Ref. Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 767 (8th Cir. 1927); *Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc.*, 627 F. Supp. 856, 863 (E.D. Pa. 1985); *Zerpol*, 561 F. Supp. at 409; *Mario's Enterprises, Inc. v. Morton-Norwich Prod., Inc.*, 487 F. Supp. 1308, 1311-12 (W.D. Ky. 1980).

In *Mario's* the operator of a chain of restaurants sued a pharmaceutical manufacturer for defamation and product disparagement. Mario's claims arose from a television advertisement in which an actor who was portraying a firefighter said that he was unsure whether a "two-alarm fire, or Mario's 3-alarm meatballs" had caused his "4-alarm case of In-di-ges-tion." 487 F. Supp. at 1311. Morton-Norwich argued that the "Mario" in the commercial referred to the firehouse cook who was visible in the background of the scene. *Id.* The court held that no reasonable viewer would understand the advertisement to refer to restaurants owned by the plaintiff or to the meatballs served in those restaurants. *Id.* at 1311-12.

See also *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983). In *Jacobson* a television broadcast criticized Brown & Williamson for encouraging children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures. The Seventh Circuit held that although Brown & Williamson may have stated a claim for defamation, the facts did not give rise to an action for product disparagement because the broadcast did not suggest that Brown & William's cigarettes were of lesser quality or any more unhealthy than other cigarettes. *Id.* at 274.

42. *Zerpol*, 561 F. Supp. at 410; see *National Refining*, 20 F.2d at 766-67; *Mario's*, 487 F. Supp. at 1311-12; *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 334 N.Y. S.2d 325, 329-30 (Sup. Ct. 1972). For an application of this test to libel cases, see *Zelik v. Daily News Publishing Co.*, 288 Pa. Super. 277, 431 A.2d 1046, 1049 (1981); *Farrell v. Triangle Publications, Inc.*, 399 Pa. 102, 106, 159 A.2d 734, 737 (1960); *Grove v. Morgan*, 576 P.2d 1155, 1156-57 (Okla. 1978); *Faucett Publications, Inc. v. Morris*, 377 P.2d 42, 50 (Okla. 1962). A jury may infer reference to the plaintiff's product, just as it may infer that the statement was disparaging in nature. *National Refining*, 20 F.2d at 767; see Note, *supra* note 7, at 77.

Zerpol involved the question of whether statements disparaging the product of a fictitious character could be actionable. 561 F. Supp. at 407. In that case, a manufacturer and seller of pollution control systems brought suit against a competitor on theories of product disparagement, unfair competition, tortious interference with economic relationships, and antitrust. 561 F. Supp. at 407-08. DMP's advertisements depicted a fictitious character called Sid and his fictitious business, Sid's Waste Water Treatment Emporium. *Id.* at 406-07. The advertise-

The second element of the cause of action for product disparagement is falsity.⁴³ The plaintiff has the burden of proving that the defendant's statement is false.⁴⁴ Plaintiffs in product disparagement cases may have difficulty establishing the falsity of statements when the statements reflect subjective opinions rather than objective facts.⁴⁵ Furthermore, first amendment guarantees of free speech and press may protect many statements of opinion.⁴⁶

To satisfy the third element of a cause of action for product disparagement, the plaintiff must show malice,⁴⁷ or an intent to prevent third parties from doing business with the plaintiff or otherwise to interfere in the plaintiff's economic relations with others. A product disparagement plaintiff may establish the malice or intent element by showing that the defendant knew its statement was false and that the defendant knew the statement would disparage the plaintiff's products.⁴⁸ Courts generally allow proof of a defendant's reckless disregard for the truth or falsity of a statement to satisfy the requirement of knowledge or intent.⁴⁹

ments disparaged Sid's pollution control system, the "Z-RO-TEC" system by stating that Sid specialized in zero technology engineering. *Id.* at 407. The advertisements also impugned Sid's understanding of EPA regulations as well as his general knowledge of waste water treatment. *See id.* at 406-08, 410. The court, therefore, construed Zerpel's complaint as a claim for defamation because DMP's statements attacked Sid's technical abilities and would arguably discourage others from contracting for his services. *Id.* at 410. DMP asserted that the statements did not constitute actionable disparagement or defamation because they did not specifically refer to Zerpel or its product. *Id.* The Zerpel court stated that a plaintiff may recover for injury resulting from publication about a fictitious person. *Id.* at 411 (citing *Geiser v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)); *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966); *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901, 904 (8th Cir. 1951); *see also* RESTATEMENT § 564 comment d (real person may recover for libelous statements dealing with fictitious character if character bears such resemblance to real person as to make it reasonable for others to understand that character intended to portray that real person). The Zerpel court held, however, that third parties could not reasonably understand DMP's advertisements to refer to Zerpel or its products. 561 F. Supp. at 414-15. The court, therefore, dismissed the disparagement and defamation claims. *Id.* at 415.

43. *Bunch v. Artec Int'l Corp.*, 559 F. Supp. 961, 971 (S.D.N.Y. 1983); *Zerpel*, 561 F. Supp. at 409; *Polygram*, 70 Cal. App. 3d at 549, 216 Cal. Rptr. at 255; *Beecher v. Montgomery Ward & Co.*, 267 Or. 496, 501, 517 P.2d 667, 670 (1973).

44. The law of defamation differs from disparagement with respect to the falsity element. In defamation actions, falsity is presumed and the defendant has the burden of proving truth as a defense. *See* Note, *supra* note 7, at 75-76; *see also* RESTATEMENT § 651(1)(c) (setting forth burden of proof on issue of falsity in product disparagement and other injurious falsehood actions).

45. *See* *Union Car Advertising Co. v. Collier*, 263 N.Y. 386, 399, 189 N.E. 463, 469 (1934); Note, *The Fact Opinion Distinction in First Amendment Libel Law: The Need For a Bright-Line Rule*, 72 GEO. L.J. 1817, 1820-54 (1984); Note, *supra* note 7, at 75-76.

46. *Bose Corp. v. Consumers Unions of U.S., Inc.*, 692 F.2d 189, 193-94 (1st Cir. 1982) ("there is no such thing as a false idea"); *see infra* notes 194-200 and accompanying text.

47. *Bose*, 692 F.2d at 193-94. According to the *Bose* court, a public figure in a product disparagement case must prove actual malice. *Id.* at 195 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)); *see infra* notes 194-200 and accompanying text; *see also* Note, *supra* note 7, at 78-84.

48. *Dairy Stores*, 516 A.2d at 228-29 (citing series of decisions from many jurisdictions applying actual malice standard to product disparagement claims); *see* Note, *supra* note 7, at 78.

49. 692 F.2d at 192-94; *see* RESTATEMENT § 623A comment d; *see also* RESTATEMENT § 580A comment d (discussing element of intent with respect to actions for defamation). *But see* *Waste Distillation Technology, Inc. v. Blaseland & Bouck Engineers, P.C.*, 523 N.Y.S.2d

Finally, a plaintiff who asserts a product disparagement claim must allege and prove special damages.⁵⁰ The plaintiff may satisfy the special damages requirement only by showing a liquidated or actually realized pecuniary loss.⁵¹ General, implied, or presumed damages fail to support a claim for product disparagement.⁵² A plaintiff may, however, recover for clear pecuniary losses.⁵³ As part of these pecuniary losses, the plaintiff may recover the cost of litigation incurred in a reasonable effort to vindicate the product's quality.⁵⁴ The plaintiff also may recover for loss due to the impaired marketability of the product.⁵⁵ The product disparagement plaintiff must substantiate such loss, however, by evidence of lost sales.⁵⁶ To prove lost sales, the plaintiff ordinarily must identify specific lost sales, rather than testify to a general decrease in sales volume.⁵⁷ Specifically, the plaintiff must present the names of all lost customers and show a causal relationship between the defendant's statements and the plaintiff's lost sales.⁵⁸ The traditional rationale for the special damages requirement was that if a merchant suffered ac-

575, 577 (App. Div. 1988) (negligence standard applied to element of intent to disparage under state libel statute).

50. *Erick Bowman Remedy Co. v. Jensen Snasbury Laboratories, Inc.*, 17 F.2d 255, 261 (8th Cir. 1926); see *Dairy Stores*, 516 A.2d at 237; *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103, 1115 (D.N.J. 1983); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1253-54 (D. Ariz. 1981); *Testing Sys. Inc. v. Magnaflux Corp.*, 251 F. Supp. 286, 290-91 (E.D. Pa. 1966); *Marlin*, 64 N.E. at 164-65; *Dooling v. Budget Publishing Co.*, 144 Mass. 258, 10 N.E. 809, 811 (1887). But see *Hollymatic Corp. v. Holly Sys., Inc.*, 620 F. Supp. 1366, 1371 (N.D. Ill. 1985) (citing *Big O'Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219, 1235 (D. Colo. 1976)) (as matter of policy there is no reason to require special damages in business disparagement case), modified, 451 F.2d 1365 (10th Cir. 1977), cert. denied, 434 U.S. 1052 (1978); *Royer v. Stooddy*, 192 F. Supp. 949, 953 (W.D. Okla. 1961) (trend is to do away with necessity of alleging special damages). *Compare Aerosonic Corp. v. Trodyne Corp.*, 402 F.2d 223, 231 (5th Cir. 1968) (no special damages need be alleged or proved if complaint of disparagement based on unfair competition and not libel) (citing *Wiegand Co. v. Trent Co.*, 122 F.2d 920, 924 (3d Cir. 1941) (special damages not necessary element of claims for unfair competition), cert. denied, 316 U.S. 667 (1942)).

51. *Marlin*, 64 N.E. at 164-65; see *Erik Bowman*, 17 F.2d at 261; PROSSER & KEETON, *supra* note 1, § 128.

52. *Marlin*, 64 N.E. at 164-65; see *Erik Bowman*, 17 F.2d at 261 (plaintiff must allege loss of certain customers by name and facts showing that false publication directly caused special damages); PROSSER & KEETON, *supra* note 1, § 128.

53. See Note, *supra* note 7, at 91.

54. *Zerpol*, 561 F. Supp. at 409; see *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150 (S.D.N.Y. 1983); see also *Rayl v. Skull Enter., Inc.*, 108 Idaho 524, 700 P.2d 567, 572-73 (1984) (attorneys fees incurred in removing false lien from title of property recoverable in slander of title action); *Summa Corp. v. Greenspun*, 655 P.2d 513, 515 (Nev. 1983) (attorneys' fees recoverable in slander of title action; citing Michigan, Montana, New Mexico and Utah as jurisdictions conforming to this rule).

55. *Erik Bowman*, 17 F.2d at 261.

56. *Id.*

57. See *Erlich v. Enter*, 224 Cal. App. 2d 69, 72, 36 Cal. Rptr. 256, 258 (1964) (general decrease in sales and name of one lost customer insufficient to recover special damages); Note, *Trade Libel and Its Special Damage Requirement*, 17 HASTINGS L.J. 394 (1965). A plaintiff may rely on a substantial amount of general lost sales over a sustained period naturally and probably resulting from a disparaging publication if the plaintiff is unable to allege the names of particular lost customers. *Erik Bowman*, 17 F.2d at 261; see *supra* note 52 and accompanying text.

58. *Erik Bowman*, 17 F.2d at 260-62; *Fairyland*, 413 F. Supp. at 1292-93; *Erlich*, 224 Cal. App. at 72, 36 Cal. Rptr. at 258; see Note, *supra* 57, at 394. For a discussion of the special damage requirement set forth in *Erik Bowman* and *Fairyland*, see *supra* notes 50 and 57.

tual damages, it would have no difficulty showing specific lost sales.⁵⁹ Today, however, proving special damages is a burdensome task.⁶⁰

C. Case Law Development of Product Disparagement Actions

Plaintiffs file product disparagement actions in a variety of factual circumstances. Product disparagement plaintiffs often claim that statements made by competitors falsely disparaged the plaintiffs' products. The allegedly disparaging statements frequently appear in competitors' advertisements. In other instances, however, product disparagement complainants may allege that noncompetitors' statements referring to the plaintiffs' products constitute actionable disparagement. Defendant noncompetitors may be dissatisfied customers, consumer interest groups, trade journal publishers, or members of the news media. Historically, courts have distinguished between statements made by competitors and those made by noncompetitors.⁶¹

1. Noncompetitors

One recent case involving product disparagement by a noncompetitor is *Dairy Stores, Inc. v. Sentinel Publishing Co.*⁶² In *Dairy Stores* Sentinel's newspaper published a series of articles focusing on the water shortage in Milltown, New Jersey, and the consequent increase in sales of bottled water at Dairy Stores' Milltown convenience store. When Dairy Stores refused to reveal the source of its bottled "spring water," a reporter took a sample of the water to certain testing laboratories to determine the composition of the spring water. In a subsequent article the reporter disclosed the laboratories' test results, which indicated that Dairy Stores' bottled water contained chlorine and, therefore, could not be real spring water.

The majority of the *Dairy Stores* court acknowledged that the facts gave rise to a cause of action for product disparagement. Deferring to the characterization of the claim adopted by the parties and the lower court, however, the majority decided the case as a defamation action.⁶³ A significant concur-

59. *Wilson v. Dubois*, 35 Minn. 471, 29 N.W. 68 (1886); see Note, *supra* note 57, at 395.

60. Modern retail markets are larger and more complex. Sales transactions, therefore, are not personal exchanges. Large manufacturers do not even deal directly with the ultimate consumers of their products. In fact, many retailers and other businesses do not know the customers with whom they do transact business in person. These factors have made the special damages element extremely difficult, if not impossible, to satisfy in many cases. See *Zerpol*, 561 F. Supp. at 409; Note, *supra* note 57, at 395. Financial experts are unable, however, to make accurate predictions of future lost sales. Accurate lost sales projections may resolve the problem of uncertain or unascertainable damages and thereby virtually eliminate the need for a showing of specific lost sales and customers. See *id.* at 395.

61. Smith, *supra* note 2, at 141-42; see Comment, *The First Amendment and the Basis of Liability in Actions for Corporate Libel and Product Disparagement*, 27 EMORY L.J. 755, 760-61 (1978).

62. 104 N.J. 125, 516 A.2d 220 (1986).

63. 516 A.2d at 224. The majority reasoned that although the article disparaged Dairy Stores' bottled water, it also defamed Dairy Stores as an entity by implying that the corporation attempted to deceive the public by refusing to disclose the source of its water and by fraudulently representing its water as spring water. *Id.* at 225. For a discussion of the distinction between defamation and disparagement drawn by the *Dairy Stores* court, see *supra* notes 8-9 and accompanying text.

ring opinion argued that the claim should have been decided as a product disparagement action.⁶⁴

2. Competitors

As a general rule, no action for product disparagement arises when a competitor or trade rival favorably compares its own products or goods to those of another.⁶⁵ Despite the fact that product comparisons impliedly disparage competitors' products, courts refuse to recognize an action if a competitor merely states that its products are better than all others,⁶⁶ that its products are better than those of a specified person,⁶⁷ or that its products are better in some certain way than those of another.⁶⁸ The rationale of this general rule is that the public regularly regards seller's talk⁶⁹ to be untrustworthy and, therefore, does not rely upon it.⁷⁰ This rationale assumes that because sales hype does not dissuade potential customers from purchasing the product of the advertiser's competitor, the competitor suffers no injury.⁷¹ Statements

64. 516 A.2d at 237-38 (Giribaldi, J., concurring).

65. See, e.g., *Sims v. Mack Truck Corp.*, 488 F. Supp. 592, 605 (E.D. Pa. 1980) (consumers naturally wary of competitors' claims); *Universal Athletic Sales Co. v. American Gym Recreational and Athletic Equip. Corp.*, 397 F. Supp. 1063, 1073 (W.D. Pa. 1975) (public expects competitors to claim that their products are better than others), *vacated on other grounds*, 546 F.2d 530 (3d Cir. 1976); *Smith-Victor Corp. v. Sylvania Elec. Prods.*, 242 F. Supp. 302, 308 (N.D. Ill. 1965) (sellers in competitive market have privilege to puff statements about their products); see *Smith*, *supra* note 2, at 133; see also *Handler*, *Unfair Competition*, 21 IOWA L. REV. 175, 197 (1986); Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304 (1938).

Federal statutes govern certain instances of unfair deceptive competition and of trade-mark violations. See *infra* note 83 (setting forth pertinent provisions of section 5 of Federal Trade Commission Act, 15 U.S.C. § 45 (1982 & Supp. II 1984)); note 108 (setting forth provisions of section 43(a) of Lanham Trade-mark Act, 15 U.S.C. § 1125(a) (1982)); text accompanying notes 83-123 (discussing potential private actions under those statutes).

66. See *Smith*, *supra* note 2, at 33.

67. *Id.*

68. *Id.*

69. *Id.* at 134. Competitors in the market place are "expected to sing a little of the tune 'Anything Theirs Can Do, Ours Can Do Better.'" *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp.*, 397 F. Supp. 1063, 1073 (W.D. Pa. 1975), *vacated on other grounds*, 546 F.2d 530 (3d Cir. 1976), *aff'd*, 566 F.2d 1171 (3d Cir. 1979).

Another rationale for the rule that mere comparison does not constitute actionable disparagement is that diluting the puffing privilege would have an anti-competitive effect. *Sims v. Mack Truck Corp.*, 488 F. Supp. 592, 605 (E.D. Pa. 1980) (citing *FTC Policy Statement on Comparative Advertising*, 48 U.S.L.W. 2136 (Aug. 13, 1979)). For a discussion of statutory remedies for product disparagement under the Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1982 & Supp. II 1984), see *infra* text accompanying notes 83-106.

70. The rule is grounded in the common sense notion that purchasers will take such comparisons with a grain of salt. *Sims*, 488 F. Supp. at 605.

71. *Id.*; see, e.g., *Anheuser-Busch, Inc. v. DuBois Brewing Co.*, 175 F.2d 370, 372-76 (3d Cir. 1940) ("original" and "comparable in quality" are mere comparative advertising or seller's puffing); *Lewyt Corp. v. Health-Mar, Inc.*, 84 F. Supp. 189, 194 (N.D. Ill. 1949) ("New and Revolutionary" held not actionable), *rev'd*, 181 F.2d 855 (7th Cir. 1950); see also *White v. Mellin*, 1895 App. Cas. 154, 165 (suggests that recognizing such actions would force courts to adjudicate question of which product was better). But see Note, *supra* note 7, at 46 n.59 (questioning validity of this rationale in light of important role advertising plays in modern society).

RESTATEMENT § 646A follows the rule that a competitor's puffing statements in its advertisements are not actionable. The Restatement, however, justifies the rule in terms of the competitor's privilege and thereby sets forth a defense to product disparagement by comparison.

that attribute absolute, rather than comparative, qualities to the defendant's product, however, may give rise to a cause of action because they exceed the traditional grounds of seller puffing.⁷² Accordingly, the puffing rule requires courts to determine whether a particular statement is a mere comparison or actually sets forth positive defects in another's products.⁷³

In *National Refining Co. v. Benzo Gas Motor Fuel Co.*⁷⁴ National Refining allegedly disparaged the plaintiff's product, Benzo Gas, by stating that any gas containing benzol was harmful to vehicles. National Refining, which produced White Rose gas and competed with Benzo, stated that benzol exploded instantaneously when ignited and thereby ruined vehicles' bearings, cylinders, and valves and overheated vehicles' engines. National Refining further stated that the federal government refused to use benzol in its army vehicles and that benzol had caused vehicles to malfunction during the war. Based on its appraisal of National Refining's statements, the Eighth Circuit Court of Appeals held that such statements constituted actionable product disparagement because they were not mere comparison, but pointed out actual defects in Benzo's products.⁷⁵

*Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc.*⁷⁶ is one of the best-known cases involving a competitor's statements that go beyond mere comparison to affirmatively disparage the plaintiff's products. Bowman and Salsbery both manufactured veterinary pharmaceuticals. Salsbery stated in the journal it published that an in-house lab test and a test performed by the state's food commissioner indicated that a particular medicine Bowman manufactured consisted only of ordinary brown sugar and bran. Salsbery further stated that the state farm bureau was about to take action to prevent the sale of Bowman's products. Bowman alleged in its complaint that Salsbery's statements implied that its products were worthless and

See PROSSER & KEETON, *supra* note 1, § 128 n.74. "To say that a merchant's advertisements are puffing states, in effect, that no cause of action can be based upon the representations" and that the puffing privilege is a complete defense to any such action. *Smith-Victor Corp. v. Sylvania Elec. Prods.*, 242 F. Supp. 302, 308 (N.D. Ill. 1965). "The puffing rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him or . . . would be influenced by such talk." *Id.* (citing W. PROSSER, TORTS 739 (3d ed. 1981)).

72. *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302 (N.D. Ill. 1974). Courts have held a competitor's express statement that the plaintiff's product is worthless or useless to be clearly actionable because such statements obviously exceed the boundaries of comparison. See *Smith*, *supra* note 2, at 135.

73. See *Smith*, *supra* note 2, at 135; *infra* note 86 and accompanying text (distinguishing between false, favorable statements about advertiser's own goods and disparaging misrepresentations of goods of advertiser's competitor).

74. 20 F.2d 763 (8th Cir. 1927).

75. *Id.* at 768. The *National Refining* court examined the issue of whether the statements also constituted personal defamation of the owner of the business. The court held the statements did not constitute libel *per se*, despite the fact that they alleged the product was dangerous or harmful, because the statements did not indicate that Benzo had knowledge of the danger. *Id.* at 771; see *supra* notes 7-9 and accompanying text (discussing distinction between disparagement and defamation).

76. 17 F.2d 255 (8th Cir. 1926).

would not cure animals.⁷⁷ Although the *Bowman* court's primary concern was whether the statements also constituted defamation,⁷⁸ the court accepted Bowman's argument and indicated that the statements were sufficient to state a cause of action for disparagement because they were not mere comparisons.⁷⁹

Courts have held that other statements exceeded comparison and constituted actionable disparagement, including: statements that an advertiser was the only photographer offering a certain type of photo processing,⁸⁰ statements that an advertiser's extract of meat was the only genuine brand,⁸¹ and statements that certain wood blocks for streets sold by an advertiser's competitor had rotted rapidly.⁸²

D. Federal Statutory Remedies for Product Disparagement

1. The Federal Trade Commission Act

Under section 5 of the Federal Trade Commission Act (the FTC Act) the Federal Trade Commission (FTC) has a duty to prevent the use of unfair methods of competition in commerce.⁸³ The FTC Act provides that whenever the FTC believes that a person or a corporation is engaging in an unfair method of competition or an unfair or deceptive trade practice, it may issue a complaint against, and grant a hearing to, the alleged violator.⁸⁴ If the hearing establishes that the conduct violates the FTC Act, the FTC may require the violator to discontinue the unlawful practice by using a cease-and-desist order against the violator.⁸⁵ Pursuant to its duty to prevent unfair competition, the FTC prohibits competitors from making false and disparaging statements about another's products or business.⁸⁶

In *Perma-Maid Co. v. FTC*⁸⁷ a manufacturer of plastic containers sought review of an FTC order that directed the company to cease and desist from making representations about the danger of storing food in aluminum.⁸⁸ The Sixth Circuit Court of Appeals stated that the FTC's findings were con-

77. Bowman alleged that the statements implied the medicine was "a fraud and a humbug." *Id.* at 257.

78. *Id.*

79. *Id.*

80. *George v. Blow*, 20 N.S.W.L.R. 395 (1899) (statement implied positive defect in photo processing by all competitors including plaintiff), *cited in* Smith, *supra* note 2, at 135-36 n.53.

81. *Liebig's Extract of Meat Co. v. Anderson*, 55 L.T.R. 206 (1886) (statement implied all competing brands were not genuine), *cited in* Smith, *supra* note 2, at 135-36 n.53.

82. *Alcott v. Millar's Forests*, 21 T.L.R. 30 (1904) (statement was not comparison of plaintiff and defendant's products, but was positive disparagement pointing out defects in plaintiff's product), *cited in* Smith, *supra* note 2, at 135-36 n.53..

83. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1982 & Supp. II 1984) [hereinafter FTC Act]. Congress enacted the FTC Act in 1914 to strengthen and add uniformity to the antitrust laws. See Comment, *Private Enforcement and Rulemaking Under the Federal Trade Commission Act: Expansion of FTC Responsibility*, 69 Nw. U.L. REV. 462, 469 (1974).

84. 15 U.S.C. § 45(b) (1982 & Supp. II 1984).

85. *Id.* The FTC Act provides for judicial review of cease-and-desist orders. *Id.*

86. See Comment, *supra* note 83, at 463; Note, *supra* note 7, at 67.

87. 121 F.2d 282 (6th Cir. 1941).

88. The FTC order directed Perma-Maid to stop representing that preparing or keeping food in aluminum utensils can injure the consumer, that preparing food with aluminum uten-

clusive and sufficient to support the cease-and-desist order.⁸⁹ According to the court, the fact that Perma-Maid later forbade its agents to make or distribute the disparaging statements and punished agents who violated its instructions did not warrant setting aside the FTC order.⁹⁰ The *Perma-Maid* court emphasized that the FTC could not discharge its duty to prevent unfair competition by dismissing its complaint upon discontinuation of the objectionable practices⁹¹ and stated that Perma-Maid's abandonment of such unfair practices did not render the controversy moot.⁹² Accordingly, the Sixth Circuit held that the FTC could discharge its duty only by issuing and enforcing the appropriate cease-and-desist order.⁹³ The court upheld the FTC order, stating that the order did not injure Perma-Maid and that the order would effectively aid the company in its efforts to end the unfair practice.⁹⁴

In addition to reviewing the enforceability of FTC orders, courts also have addressed whether the FTC Act affords product disparagement plaintiffs a private cause of action against those who injure them by violating the FTC Act. Although certain courts have refused to grant a private action to plaintiffs under the FTC Act,⁹⁵ other courts have held that the FTC Act affords plaintiffs a private cause of action. In *Guernsey v. Rich Plan*⁹⁶ the Guernseys' complaint alleged that they had been victimized by the defendant's unfair and deceptive practices in violation of the FTC Act. Rich Plan moved for dismissal for failure to state a claim upon which relief could be granted.⁹⁷ Rich Plan based its motion upon the theory that the FTC Act itself contains no provisions for private enforcement because the FTC has original jurisdiction over the acts of which the Guernseys complained.⁹⁸ Under the doctrine

sils causes poisons to form, and that eating food prepared or stored in aluminum utensils will cause ulcers, cancers, and other diseases.

89. *Id.* at 284.

90. *Id.*

91. *Id.* at 284-85.

92. *Id.* (citing *FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938)). The *Perma-Maid* court rejected the manufacturer's argument that because the company had already abandoned the unfair practices in question, the controversy was moot. 121 F.2d at 284. The court emphasized the FTC's duty to prevent unfair competition. *Id.* at 284. Accordingly, the fact that the company discontinued such practices did not guarantee that it would not resume such practices and, therefore, did not render the issue moot. *Id.*

Generally, an action is moot when it no longer presents a justiciable controversy because issues involved have ceased to exist. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam); see Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1383-86 (1973); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374 (1974). The doctrine of mootness stems from the constitutional requirement that a "case" or "controversy" exist before federal courts can assert jurisdiction. See U.S. CONST. art. III, § 2, cl. 1; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937). In addition to this constitutional component, however, the mootness doctrine also involves considerations of judicial prudence. See *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125-27 (1974).

93. 121 F.2d at 284-85.

94. *Id.* at 285.

95. *Guernsey v. Rich Plan*, 408 F. Supp. 582, 586 (N.D. Ind. 1976).

96. *Id.*

97. See FED. R. CIV. P. 12(b)(6).

98. *Guernsey*, 408 F. Supp. at 586; see *LaSalle Street Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004, 1006 (N.D. Ill. 1968) (private parties may not seek relief under

of implication, a federal regulatory statute implies a private right of action if the court determines: (1) that the defendant has violated a statutory provision that Congress designed to protect a class of persons including the plaintiffs from the type of harm of which the plaintiffs complain, and (2) that the purpose of the statute indicates the propriety of affording plaintiffs the remedy they seek.⁹⁹

The *Guernsey* court noted that federal courts have refused to imply a private action from the FTC Act.¹⁰⁰ The court pointed out, however, that until *Holloway v. Bristol Meyers Corp.*,¹⁰¹ only injured competitors sought relief under the FTC Act as private litigants. In *Holloway* the FTC had not taken any action regarding Bristol-Meyers at the time that the private litigants filed suit against the company. In contrast, the FTC had issued administrative rulings and cease-and-desist orders against Rich Plan at the time that the Guernseys filed suit. The *Guernsey* court distinguished the *Holloway* decision on that ground.¹⁰² The *Guernsey* court held that the Guernseys could maintain a private cause of action under the FTC Act and that there was no reason to subrogate consumer interest to expert administrative judgment since the FTC already had issued administrative orders.¹⁰³

The *Guernsey* court also noted that although the FTC had primary jurisdiction over complaints under the FTC Act, it did not have exclusive jurisdiction.¹⁰⁴ Under the doctrine of implication, the court determined that the FTC Act afforded the Guernseys a private cause of action.¹⁰⁵ The *Guernsey* court emphasized the lack of effective FTC prevention of unfair and deceptive practices to justify its holding under the implication doctrine.¹⁰⁶

2. The Lanham Trade-Mark Act

While the purpose of the FTC Act is to prevent unfair competition and unfair or deceptive practices,¹⁰⁷ Congress specifically intended the Lanham

FTC Act in federal courts because FTC, rather than courts, has original jurisdiction over claims under FTC Act), *rev'd in part on other grounds*, 445 F.2d 84 (7th Cir. 1971).

99. *Guernsey*, 408 F. Supp. at 586.

100. *Id.*

101. 327 F. Supp. 17 (D.D.C. 1971), *aff'd*, 485 F.2d 986 (D.C. Cir. 1973). In the *Holloway* case the plaintiff filed a class action suit on behalf of people who purchased Excedrin pain reliever in reliance on Bristol-Myers' advertising representations. Holloway alleged that Bristol-Myers misrepresented the effectiveness of Excedrin. The *Holloway* court refused to find a private cause of action under the FTC Act, however, and held that consumers may obtain redress solely through the FTC's administrative rulings. 327 F. Supp. at 22; see *Guernsey*, 408 F. Supp. at 586-87 (discussing *Holloway* case).

102. *Guernsey*, 408 F. Supp. at 587.

103. *Id.*

104. *Id.* at 588 (citing *Moore v. New York Cotton Exch.*, 270 U.S. 593, 597 (1926)).

105. *Id.*

106. *Id.* at 586-87; see Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U.L. REV. 274, 278-90 (1975); Grady & Freeman, *Advertising and the FTC: How Much Can You "Puff" Until You're Legally Out of Breath?*, 36 ADMIN. L. REV. 399, 399-411 (1984); Sullivan & Marks, *The FTC's Deceptive Advertising Policy: A Legal and Economic Analysis*, 64 OR. L. REV. 593, 596-632 (1986); White, *FTC: Wrong Agency for the Job of Adjudication*, 61 A.B.A.J. 1242, 1245 (1975); Comment, *supra* note 83, at 463-86.

107. See *supra* note 83 and accompanying text.

Trade-Mark Act (the Lanham Act)¹⁰⁸ to eliminate deceitful practices involving the misuse of trademarks.¹⁰⁹ In *Bernard Food Industries, Inc. v. Dietene Co.*¹¹⁰ the Seventh Circuit stated that although Congress intended the Lanham Act to cover misrepresentations that do not involve trademarks,¹¹¹ courts should construe section 43(a) of the Lanham Act to include only such false descriptions or representations as are of substantially the same economic nature as those involving misuse of the trademarks.¹¹² According to the court, section 43(a) does not encompass every undesirable business practice involving deception.¹¹³ Rather, the court stated, when such deceptive practices fall outside the field of the trademark laws, they are likewise outside the scope of section 43(a), particularly when they come within the scope of other federal statutes such as the FTC Act.¹¹⁴ The

108. Lanham Trade-Mark Act § 43(a), 15 U.S.C. § 1125(a) (1982) [hereinafter Lanham Act]. The Lanham Act provides that anyone who uses any goods, any false description or representation in connection with any goods and causes such goods to enter into commerce shall be liable in a civil action to any person who believes he is likely to be injured by the use of such false description or representation. *Id.*

109. *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279, 1283-84 (7th Cir. 1969) (citing *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 222 (D. Mass. 1949), *aff'd*, 180 F.2d 896 (1st Cir. 1950) (per curiam)), *cert. denied*, 397 U.S. 912 (1970).

By enacting § 43(a) of the Lanham Act in 1946, Congress created a new federal statutory cause of action applicable to certain types of unfair competition in interstate commerce. *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 781 (N.D. Ill. 1974). For discussion of the legislative history and subsequent developments under the Lanham Act, see Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N.Y.U.L. REV. 1029, 1029-39 (1957); Weil, *Protectability of Trademark Values Against False Competitive Advertising*, 44 CAL. L. REV. 527, 537 (1956); Weston, *Trademarks and Unfair Competition*, 54 GEO. WASH. L. REV. 143, 148-54 (1984); Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trade-marks and Unfair Competition*, 42 COLUM. L. REV. 955, 974-86 (1942); Note, *Section 43(a) of the Lanham Act: Its Development and Potential*, 3 LOY. U.L.J. 327, 333 (1972); Comment, *Consumer Motivation In Trademark and Unfair Competition Law: On The Importance of Source*, 31 VILL. L. REV. 1, 6-10 (1986).

110. 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

111. The Lanham Act uses the term "trademark" to include "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify and distinguish his goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127 (Supp. III 1985).

112. 415 F.2d at 1283.

113. In *Dietene* Bernard Food brought a diversity action against Dietene seeking damages for false disparagement of one of its products in violation of section 43(a) of the Lanham Act. Bernard manufactured an instant custard mix containing no egg solids. Soon thereafter, Dietene began marketing its quick egg custard mix containing egg solids. Later, Bernard began to market an instant egg custard also containing egg solids. Dietene's chemist made a comparison sheet of Dietene's egg custard product and Bernard's eggless custard mix. The chemist was unaware of Bernard's newer egg product and based his comparison upon data for the old eggless mix. Moreover, he failed to distinguish the old product from the new product. Bernard filed a complaint with the FTC upon obtaining a copy of the comparison sheet, although Dietene distributed the sheet to only a few Dietene employees. The FTC closed the matter soon after the defendant agreed not to use the sheet in future advertising. Bernard then initiated the diversity action seeking damages for Dietene's alleged violation of the Lanham Act, although Bernard showed no lost sales or other damages.

114. *Dietene*, 415 F.2d at 1283-84 (citing *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 222 (D. Mass. 1949), *aff'd*, 180 F.2d 896 (1st Cir. 1950) (per curiam)). In *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974), the court set forth the elements a plaintiff must allege according to the *Dietene* holding to state a claim under § 43(a) of the Lanham Act. The elements are: (1) the defendant made false statements of fact about its own product in its comparison advertisements; (2) these advertisements actually deceived or

Dietene court concluded that the Lanham Act does not apply to misrepresentations concerning a competitor's product, but only applies to false or deceitful representations that a manufacturer or merchant makes about his own products or goods.¹¹⁵

Although *Dietene* held that a product disparagement plaintiff may not recover under the Lanham Act, other courts have suggested that the Act does afford a private cause of action for product disparagement. In *Smith-Victor Corp. v. Sylvania Electric Products, Inc.*¹¹⁶ the court examined the question of whether the Lanham Act gave the plaintiff standing to bring suit for pecuniary loss.¹¹⁷ The court rejected Sylvania's argument that the Lanham Act applied only to trademarks and held that the Lanham Act provided Smith-Victor a case of action because Sylvania had falsely represented its own product to the detriment of Smith-Victor.¹¹⁸ The *Smith-Victor* court rationalized its conclusion by pointing to the legislative intent of the statute: to regulate commerce and to protect people engaged in commerce against unfair competition.¹¹⁹ Accordingly, the court reasoned that Congress did not intend the Lanham Act to apply only to trademark cases.¹²⁰

may deceive a substantial segment of their audience; (3) such deception is material and is likely to influence the purchasing decision; (4) the defendant caused its falsely advertised goods to enter interstate commerce; and (5) the plaintiff has been, or is likely to be, injured either by direct diversion of sales from itself to the defendant, or by the decrease in the goodwill that its products enjoy with the buying public. *Id.*

115. 415 F.2d at 1284; see *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3d Cir. 1954) (allegation that defendant used photograph of plaintiff's more expensive dress to advertise defendant's inexpensive dress and that misrepresentation caused plaintiff to lose business because customers mistakenly believed that plaintiff's dress actually was worth less stated cause of action under Lanham Act); *General Pool Corp. v. Hallmark Pool Corp.*, 259 F. Supp. 383, 385-86 (N.D. Ill. 1966) (plaintiff stated cause of action under Lanham Act by alleging defendant's use, in its advertising, of picture of pool that plaintiff installed, although act does not require plaintiff to show actual palming off).

Not all courts, however, have seen the logic of the *Dietene* court's distinction. In *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 782 n.10 (N.D. Ill. 1974), the court found it illogical to distinguish between a misrepresentation about the plaintiff's product and a misrepresentation about the defendant's product when the defendant uses the particular statement in comparison advertising. The *Skil* court found no justification for allowing the plaintiff a cause of action in the former instance but not in the latter. The court noted that in comparison advertising a false statement by the defendant about the plaintiff's product has the same detrimental effect as a false statement about the defendant's product. *Id.* Such a misrepresentation by the defendant would tend to deceive the public concerning the respective qualities of the products and possibly induce the purchase of an inferior product. *Id.*

116. 242 F. Supp. 302 (N.D. Ill. 1965). For a discussion of the competitors puffing issue in *Smith-Victor*, see *supra* notes 71-72 and accompanying text.

117. 242 F. Supp. at 309-10.

118. *Id.* at 310; see also *U-Haul Int'l, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1253 (D. Ariz. 1981) (statements placed in ad with knowledge or intent that they will affect consumer's judgment are not puffery, but constitute actionable representations within meaning of Lanham Act), *aff'd*, 681 F.2d 1159 (9th Cir. 1982). In *Smith-Victor*, Sylvania falsely advertised that its product, designed to provide light for movie camera filming, produced an amount of candlepower equivalent to the light produced by the type of product that Smith-Victor manufactured. Sylvania's statements were absolute representations rather than mere comparative puffing.

119. *Smith-Victor*, 242 F. Supp. at 310; see Lanham Act § 45, 15 U.S.C. § 1127 (Supp. III 1985).

120. *Id.* But see *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279, 1283-84 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970). In *Dietene* the court noted that only one phrase

After determining that Smith-Victor had standing to sue under the Lanham Act, the court addressed whether section 43 of the Lanham Act retained the common law requirement of palming off.¹²¹ The *Smith-Victor* court observed that the statute does not refer to palming off or to a defendant's false advertising about a plaintiff's product and that the provision refers only to the advertising of one's own product.¹²² The *Smith-Victor* court based its conclusions upon those observations and concluded that the Lanham Act did not incorporate the common law requirement of palming off.¹²³

E. Injunctive Relief

Many product disparagement plaintiffs seek injunctive relief in addition to, or instead of, monetary damages. Because injunctions are a form of equitable relief rather than a legal remedy, traditional rules of equity apply.¹²⁴ The fundamental principles of equity jurisdiction state that equity intervenes only if necessary to prevent irreparable harm and if the remedy at law is inadequate.¹²⁵ Applying the principles of equity jurisdiction, courts have traditionally held that equity will not enjoin defamation.¹²⁶ Moreover, courts carried over the rule to the law of disparagement.¹²⁷

*Marlin Firearms Co. v. Shields*¹²⁸ continues to be the leading case in sup-

of the intent paragraph in § 45 of the Lanham Act failed to use the word "mark." *Id.* The court stated that the phrase, in such a context, refers not to every potentially unfair competitive practice, but only to the type of unfair competition that is closely associated with the misuse of trademarks. *Id.* at 1283-84. According to the *Dietene* court, that type of unfair competition or trademark misuse is the passing off of one's own goods as those of a competitor. *Id.* Thus, the court concluded that the Lanham Act applied only to cases of passing off goods. *Id.*

121. *Smith-Victor*, 242 F. Supp. at 310. The court noted the conflict between other courts on this issue. *Id.*

122. *Id.*

123. *Id.* at 310-11.

124. See *Weinbrager v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1981); *Kidd v. Horry*, 28 F. 773, 776 (E.D. Pa. 1886); Note, *Corporate Defamation*, *supra* note 3, at 993.

125. *Infusaid Corp. v. Intermedics Infusaid, Inc.*, 739 F.2d 661, 668 (1st Cir. 1984); *Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982); *Goadby v. Philadelphia Elec. Co.*, 639 F.2d 117, 122 (3d Cir. 1981) (citing, *inter alia*, *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)); see Gold, *Does Equity Still Lack Jurisdiction to Enjoin Libel or Slander?*, 48 BROOKLYN L. REV. 231, 235-48 (1982); Comment, *Enjoining Product Disparagement: Discarding the Defamation Analogy*, 64 WASH. U.L.Q. 205, 205-16 (1986); Note, *Corporate Defamation*, *supra* note 3, at 994.

126. *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987) (citing *Kukatash Mining Corp. v. SEC*, 198 F. Supp. 508, 510-11 (D.D.C. 1961), *aff'd*, 309 F.2d 647, 651 (D.C. Cir. 1962)); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967); *Huskey v. NBC*, 632 F. Supp. 1282, 1285 (N.D. Ill. 1986) (citing *Venturelli v. Trovicio*, 346 Ill. App. 429, 432, 105 N.E.2d 306, 308 (1952); *Hoxsey Cancer Clinic v. Folsom*, 155 F. Supp. 376, 378 (D.D.C. 1957) (citing *American Malting Co. v. Keitel*, 209 F. 351, 353-58 (2d Cir. 1913); see *Barteloman, Injunctions Against Speech and Writing: A Re-Evaluation*, 59 KY. L.J. 319, 322-26, 339-47 (1970); Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 641-68 (1916); Note, *Temporary Injunctions in Libel Cases*, 25 BAYLOR L. REV. 527, 527-35 (1973).

127. *Baltimore Cross-Wheel Co. v. Benies*, 29 F. 95 (D. Mass. 1886); *Kidd v. Harry*, 28 F. 773 (E.D. Pa. 1886); *Chase v. Tuttle*, 27 F. 110 (N.D.N.Y. 1886); *accord* *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 984-85 (D. Ore. 1963); *Marlin Firearms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163, 164 (1902).

128. *Marlin*, 64 N.E. at 164. For a discussion of the facts of *Marlin* in connection with the

port of the proposition that equity cannot restrain product disparagement.¹²⁹ The principal issue in the case was whether a court could enjoin in equity Shield's disparagement of Marlin's products when Marlin had no remedy at law because Marlin was unable to establish the requisite special damages.¹³⁰ The *Marlin* court held that it could not issue an injunction to restrain the disparagements even though Marlin had no legal remedy.¹³¹ The court based its holding on the theory that the guaranty of free speech and press prohibits the issuance of injunctions against all forms of speech and press and that only the law of defamation places a limit on free speech and press.¹³² The *Marlin* court ruled, in effect, that the constitutional guaranty limited Marlin to only remedies at law.¹³³

Courts in other jurisdictions, however, have held that injunctions may issue to restrain product disparagement under certain circumstances. For example, some courts have held that because product disparagement necessarily involves property rights, equity will protect those interests when no adequate legal remedy exists.¹³⁴ In *Carter v. Knapp Motor Co.*¹³⁵ Knapp sought to enjoin Carter from publicly exhibiting Carter's Hudson car decorated with a caricature of a large white elephant painted against a dark background entitled "Hudson."¹³⁶ The court reasoned that Knapp possessed a property right to conduct this business without the wrongful interference of others.¹³⁷ The *Knapp* court further reasoned that Knapp possessed a property right in the enjoyment of the good name and good will of his business and in the exercise of his employment or trade.¹³⁸ Accordingly, the court held that equity may protect these property rights by injunction if necessary.¹³⁹

After resolving the threshold issue of its jurisdiction to grant injunctive relief in a product disparagement setting, the *Knapp* court considered what

court's finding that the product disparagement did not also constitute a libel of the manufacturer, see *supra* text accompanying notes 24-28.

129. 64 N.E. at 167.

130. *Id.* at 165. See *supra* notes 50-52 and accompanying text (special damages constitute essential element of disparagement action).

131. 64 N.E. at 167. The court's opinion does not clarify whether it so holds despite the fact that Marlin had no adequate remedy at law, or because of the fact that Marlin's lack of adequate legal remedy was due to his inability to show special damages. See *id.* at 165-67.

132. *Id.* at 165. For a discussion of the first amendment guaranty of free speech and press as a defense to defamation and disparagement actions, see *infra* text accompanying notes 156-200.

133. See 64 N.E. at 165.

134. *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So. 2d 383 (1943); *Menard v. Howle*, 298 Mass. 546, 11 N.E.2d 436 (1937); *H.E. Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N.Y.S. 692 (1928).

135. 243 Ala. 600, 11 So. 2d 383 (1943).

136. Knapp alleged that the white elephant symbol denoted something of an inferior quality, cast a slur on any product so labelled, and indicated that the product was not merchantable and was of no value. Knapp further alleged that the injury caused by Carter's disparagement was not capable of being measured by any monetary standard and that the loss of business caused thereby also was incapable of exact measurement.

137. *Knapp*, 11 So. 2d at 384.

138. *Id.*

139. *Id.* at 384-85.

circumstances compel the issuance of an injunction.¹⁴⁰ The court accepted the rule that equity ordinarily will not intervene to restrain the publication of false words merely because of their falsity.¹⁴¹ The *Knapp* court distinguished *Marlin*, however, by stating that equity will intervene when restraint becomes necessary to preserve a property interest threatened by other tortious or illegal acts.¹⁴² The *Knapp* court held that equity will enjoin a publication that is "merely an instrument and incident" of such other torts.¹⁴³ Accordingly, the court distinguished between cases involving only the disparagement of a product and those also involving other tortious interference with business relations.¹⁴⁴ Moreover, the court stated that examples of such other tortious or illegal acts included conspiracy, intimidations, and coercion.¹⁴⁵ After drawing this distinction, the *Knapp* court found in the actions of Carter the requisite elements of tortious interference or coercion.¹⁴⁶

Courts have avoided the rule in *Marlin* not only by recognizing a property interest¹⁴⁷ or by finding coercion,¹⁴⁸ but also by finding that certain complaints actually stated claims of unfair competition rather than of disparagement.¹⁴⁹ In *Black & Yates, Inc. v. Mahogany Association*¹⁵⁰ Black & Yates

140. *Id.* at 385.

141. *Id.* at 385-86; see *supra* note 126 and accompanying text.

142. 11 So. 2d at 385. The *Knapp* court relied upon the opinion of Chief Justice Cordozo in *Nann v. Raimist*, 255 N.Y. 307, 174 N.E. 690, 694 (1931). Courts are capable of judging the acts that people do while claiming a constitutional right such as freedom of speech and of determining whether any limitations on the claimed right exist. *Knapp*, 11 So. 2d at 386 (citing *Jones v. City of Opelika*, 316 U.S. 584, 594 (1942)).

143. *Knapp*, 11 So. 2d at 385 (citing *Nann*, 174 N.E. at 694).

144. See *id.*

145. *Id.* The *Marlin* court also indicated that coercion, intimidation and conspiracy might constitute an exception to the rule that equity may not enjoin disparagement. *Marlin*, 64 N.E. at 166.

146. *Knapp*, 11 So. 2d at 385-86. Although in *Marlin* the court found that Shields' publication of sham letters disparaging Marlin's product clearly was intended to coerce Marlin to resume advertising in Shields' magazine, the court found that Shields' coercion was insufficient to justify an exception to the rule against enjoining disparagement. 64 N.E. at 165-67.

Compare *DeRitis v. AHZ Corp.*, 444 So. 2d 93 (Fla. App. 1984) (affirmed issuance of injunction to restrain purchasers of condominium from displaying in windows of unit pictures of lemons and signs disparaging units because owner had contractual right to regulate signs; owners characterized action as tortious interference with contractual relationship and prospective advantage) with *Singer v. Romerrick Realty Corp.*, 255 App. Div. 715, 5 N.Y.S.2d 607 (1938) (refused to enjoin disparagement of home builder's houses, although defendant intended to coerce builder to reduce purchase price).

147. *Knapp*, 11 So. 2d at 384-85; see *supra* notes 137-39 and accompanying text.

148. *Knapp*, 11 So. 2d at 385; see *supra* notes 145-46 and accompanying text.

149. *Black & Yates, Inc. v. Mahogany Ass'n*, 129 F.2d 227 (3d Cir. 1941), *aff'd on rehearing*, 129 F.2d 232, *cert. denied*, 317 U.S. 672 (1942); *H.E. Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N.Y.S. 692 (1928). The general rule is that courts may grant injunctions to restrain unfair competition, claims of which could arise in trademarks cases. *American Steel Foundries v. Robertson*, 269 U.S. 372, 381 (1926). For a discussion of the possibilities of recovering for product disparagement under The Lanham Trade-mark Act, see *supra* notes 107-123 and accompanying text.

In *Aerosonic Corp. v. Trodyne Corp.*, 402 F.2d 223, 227 (5th Cir. 1968), the court noted that Florida courts permit the issuance of an injunction to restrain unfair competition. *Id.* at 227 (citing *Creamette Co. v. Conlin*, 191 F.2d 108, 111 (5th Cir. 1951)). The *Aerosonic* court stated that many jurisdictions permit the issuance of injunctions to restrain unfair competition involving trade secrets. *Id.* at 227-28 (citing *Winston Research Corp. v. Minnesota Min. & Mfg. Co.*, 350 F.2d 134, 141-42 (9th Cir. 1965); *Franke v. Wiltschek*, 209 F.2d 493, 497-99 (2d

sought to enjoin the Association from making disparaging statements about Black & Yates' "Philippines mahogany" wood. The *Black & Yates* court interpreted the complaint as stating a cause of action for unfair competition against the Association.¹⁵¹ By construing Black & Yates' complaint as an unfair competition claim, the court not only avoided the *Marlin* rule that equity will not enjoin disparagement, but also rejected the rule outright.¹⁵² The court based its holding on the distinctions between product disparagement and defamation.¹⁵³ According to the *Black & Yates* court, product disparagement necessarily involves the property rights, coercion, and unfair competition exceptions to the anti-injunction rule.¹⁵⁴ As a result the court held that product disparagement compelled injunctive relief.¹⁵⁵

F. Qualified Privilege as a Defense to a Product Disparagement Action

A defendant in a product disparagement suit may defeat a plaintiff's claim by showing that the plaintiff failed to prove one or more of the elements of the cause of action.¹⁵⁶ A defendant also may defeat a product disparagement claim by pleading and proving an affirmative defense. Privilege constitutes the principal affirmative defense to a product disparagement claim.¹⁵⁷ Privileges may be absolute or qualified.¹⁵⁸ An absolute privilege completely immunizes the defendant from liability for the publication of potentially disparaging statements.¹⁵⁹ A qualified privilege, however, merely creates a rebuttable presumption that the publisher is not liable.¹⁶⁰ A plaintiff may rebut the presumption by showing that the defendant made the statement with malice or with bad faith, or by showing that the statements were exces-

Cir. 1953); *Shellmar Prod. Co. v. Allen-Qualley Co.*, 87 F.2d 104 (7th Cir. 1936); *A.O. Smith Corp. v. Petroleum Iron Works Co.*, 74 F.2d 934, 935 (6th Cir. 1935)). The courts cited by *Aerosonic* allowed the enjoining, to some extent, of the defendants' use of the trade secrets. See *Aerosonic*, 191 F.2d at 227-28. Some courts predicate their decisions to restrain the use of trade secrets on the basis that trade secrets constitute protectable property interests. *E.I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917); see *supra* notes 137-39 and accompanying text.

150. 129 F.2d. 227 (3d Cir. 1941).

151. *Id.* An injunction is the standard remedy for the traditional type of unfair competition known as passing off. The court does not explain how disparagement by a competitor could ever be construed as not giving rise to an action for unfair competition. See Note, *Corporate Defamation*, *supra* note 3, at 1000-01; see also *supra* note 120 and accompanying text; text accompanying notes 87-93.

152. *Black & Yates*, 129 F.2d at 229. But see Note, *supra* note 124, at 1003 (asserting that *Black & Yates* court may have reached erroneous holding that product disparagement may be enjoined and noting that fact weakened decision as precedent).

153. *Black & Yates*, 129 F.2d at 232.

154. *Id.*

155. *Id.*; see also *H.E. Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N.Y.S. 692 (1928) (equity may enjoin product disparagement when case involves unfair competition).

156. For a discussion of the elements of product disparagement, see *supra* notes 37-60 and accompanying text.

157. *Dairy Stores, Inc. v. Sentinal Publishing Co.*, 104 N.J. 125, 516 A.2d 220, 225 (1986) (privileged statement does not impose liability).

158. *Id.*

159. *Id.*

160. *Id.*

sive.¹⁶¹ Because product disparagement plaintiffs must prove malice as an element of their cause of action,¹⁶² however, disparagement defendants may always allege a qualified privilege.¹⁶³

Although the common law historically afforded qualified privilege to fair comments, it failed to extend the qualified privilege to false statements.¹⁶⁴ Accordingly, courts must consider what statements qualify as fair comment, whether the constitutional guaranty of free speech and press limits the fair comment privilege,¹⁶⁵ and whether statements of opinion may ever be false.¹⁶⁶

In *New York Times Co. v. Sullivan*¹⁶⁷ the United States Supreme Court determined the extent of the first amendment¹⁶⁸ constitutional protections' limitations on a state's power to award damages in a defamation action brought by a public official based on statements that criticize his official conduct.¹⁶⁹ The Supreme Court asserted that the constitution placed limits on a citizen's right to engage in libel or defamation.¹⁷⁰ The Court further asserted that the first amendment guaranty of freedom of expression failed to incorporate any exceptions for true statements.¹⁷¹ The *New York Times* Court held that the constitution prohibits a public official from recovering damages for a defamatory false statement relating to his official conduct, unless the official can prove with convincing clarity¹⁷² that the defendant made the statement with actual malice; that is, with knowledge of its falsity or with reckless disregard therefor.¹⁷³

Applying the *New York Times* rule to private figures, the Supreme Court in *Gertz v. Robert Welch, Inc.*¹⁷⁴ held that a private-figure plaintiff in a defamation action must allege and prove fault on the part of the defendant.¹⁷⁵

161. *Id.* (citing *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 347, 374-75, 149 A.2d 193, 202 (1959)).

162. 516 A.2d at 225; *see supra* notes 47-49 and accompanying text (plaintiffs in disparagement actions have burden of proving malice). *But see supra* note 8 and accompanying text. (plaintiffs in a defamation action need not show malice). Defamation plaintiffs must show malice only in order to overcome a defense of qualified privilege or first amendment protection. *See infra* text accompanying notes 160-61.

163. *Diary Stores*, 516 A.2d at 225.

164. *Id.* at 226-27.

165. *See supra* text accompanying notes 160-66; *see also* Carman, *Hutchinson v. Proxmine and the Neglected Fair Comment Defense*, 30 DEPAUL L. REV. 1, 10-37 (1980); Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1211-12 (1949).

166. *See supra* notes 43-46 and accompanying text; *infra* notes 167-76 and accompanying text.

167. 376 U.S. 254 (1964).

168. U.S. CONST., amend. I.

169. 376 U.S. at 256.

170. *Id.* at 264.

171. *New York Times*, 376 U.S. at 270-71.

172. *Id.* at 285-86. The standard of proof is "convincing clarity." *Id.* *But see* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (standard reformulated as "clear and convincing proof").

173. *New York Times*, 376 U.S. at 279-80; *see* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147-48, 155 (1975) (public figures, as well as public officials, must meet *New York Times* actual malice requirement to ensure uninhibited debates).

174. 418 U.S. 323, 325 (1974).

175. *Id.* at 347.

The *Gertz* Court stated, however, that private-figure plaintiffs may recover damages on a less demanding showing than that required by *New York Times* for public-figure plaintiffs.¹⁷⁶

In *Philadelphia Newspapers, Inc. v. Hepps*¹⁷⁷ the Supreme Court set forth in detail the first amendment restrictions on common law defamation.¹⁷⁸ The *Philadelphia Newspapers* Court pointed to the distinction between private and public figures and whether the speech is of public concern as important factors in determining the existence and extent of first amendment restrictions on defamation.¹⁷⁹ According to the Court, when a speech is of public concern and the plaintiff is a public official or figure, the first amendment requires that the plaintiff show falsity and actual malice.¹⁸⁰ When a speech is of public concern but the plaintiff is a private figure, however, the first amendment requires that the plaintiff show falsity¹⁸¹ and mere fault, instead of malice, to recover actual damages.¹⁸² Finally, when a speech is of private concern and the plaintiff is a private figure, the first amendment requires no change in the common law.¹⁸³

The *Philadelphia Newspapers* Court recognized that in cases in which the factfinder is unable to decide whether the statement is true or false, the burden of proof may be dispositive.¹⁸⁴ Accordingly, the Court admitted that the first amendment requires the Court to protect some falsehood in order to protect public speech.¹⁸⁵

176. *Id.* at 348; see *supra* note 172. The *Gertz* Court reached this conclusion after considering the legitimate state interest underlying the law of libel, the fact that private figures have less access to the media to counteract defamation, and the fact that such private figures have not voluntarily placed themselves in the public eye. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1562, 89 L. Ed. 2d 783, 791 (1986) (citing *Gertz*, 418 U.S. at 341, 344-45); see Note, *Private Lives and Public Concerns: The Decade Since Gertz v. Robert Welch, Inc.*, 51 BROOKLYN L. REV. 425, 430-66 (1985). The *Gertz* Court further stated that a private-figure plaintiff must show actual malice to recover punitive damages, although he may recover actual damages by showing mere fault. *Philadelphia Newspapers*, 106 S. Ct. at 1562, 89 L. Ed. 2d at 791 (citing *Gertz*, 418 U.S. at 348-50). But see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (in cases involving private-figure plaintiff and private speech, plaintiff need not show actual malice in order to recover punitive damages).

177. 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986).

178. *Id.* at 1563, 89 L. Ed. 2d at 791-92.

179. *Id.*

180. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

181. *Id.*, 89 L. Ed. 2d at 792. The *Philadelphia Newspapers* Court maintained that the common law rule, which states that the defendant must bear the burden of proving truth must fall to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages. *Id.*; Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, RUTGERS L.J. 471, 487 (1975); see Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1214-19 (1976); Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 175 (1977).

182. *Philadelphia Newspapers*, 106 S. Ct. at 1563, 89 L. Ed. 2d at 792 (citing *Gertz*, 418 U.S. at 347-48).

183. *Id.* at 1563, 89 L. Ed. 2d at 792 (citing *Dun & Bradstreet*, 105 S. Ct. at 2939; *Philadelphia Newspapers*, 106 S. Ct. at 1563, 86 L. Ed. 2d at 593).

184. *Id.* at 1563; 89 L. Ed. 2d at 792.

185. *Id.* at 1564-65, 89 L. Ed. 2d at 793-94 (citing *Gertz*, 418 U.S. at 341). The Court noted, however, that evidence offered to show fault will generally encompass evidence of the falsity of the matters asserted. *Id.* at 1565, 89 L. Ed. 2d at 794. But see *id.* at 1571, 89 L. Ed. 2d at 795 (Brennan, J., dissenting). (As long as the plaintiff has the burden of proving fault a

The commercial speech doctrine enunciated in *Valentine v. Chrestensen*¹⁸⁶ originally provided that the constitutional guaranty of free speech and press did not protect purely commercial advertising.¹⁸⁷ The *Valentine* Court reasoned that, as economic activity, commercial advertising is already subject to government regulation under the commerce clause.¹⁸⁸ The Court stated that the government's power to restrain such advertisement, therefore, was a lesser included power of the commerce power.¹⁸⁹

In *Bigelow v. Virginia*¹⁹⁰ the Supreme Court narrowed the commercial speech doctrine by holding that the first amendment protects commercial speech if the speech contains factual material of public interest.¹⁹¹ The Supreme Court subsequently held, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁹² that the first amendment may protect truthful, purely commercial advertisements, so long as the advertisements contain any material of public interest.¹⁹³

In *Bose Corp. v. Consumers Union of U.S., Inc.*¹⁹⁴ the Supreme Court first confronted the question of whether the *New York Times* actual malice standard applied to product disparagement actions as well as to personal defamation actions.¹⁹⁵ The federal district court in *Bose* held that the actual malice standard is applicable in product disparagement cases if the plaintiff qualifies as a public figure for first amendment purposes.¹⁹⁶ The district

significant amount of true speech will not be deterred unless the private person victimized by a malicious libel also can prove falsity; the majority's decision "trades on the good names of private individuals with little first amendment coin to show for it.")

186. 316 U.S. 52 (1942).

187. *Id.* at 54; see generally Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 429-48 (1971) (tracing origin and development of commercial speech doctrine); Comment, *The First Amendment and The Basis of Liability in Actions for Corporate Libel and Product Disparagement*, 27 EMORY L.J. 755, 759-70 (1978) (discussing commercial speech doctrine); Note, *Corporate Defamation*, *supra* note 3, at 972-74 (analyzing *Valentine* case). For a discussion of the rule that mere competitive puffing does not constitute actionable disparagement, see *supra* notes 69-71 and accompanying text.

188. *Id.* at 54; see U.S. CONST. art. I, § 8.

189. 316 U.S. at 54.

190. 421 U.S. 809 (1975).

191. *Id.* at 822-29. The advertisement in *Bigelow* was for abortion services.

192. 425 U.S. 748 (1976).

193. *Id.* at 758-73.

194. 466 U.S. 485 (1984).

195. See Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of U.S., Inc.*, 71 CORNELL L. REV. 477 (1986).

196. 508 F. Supp. 1249, 1270 (D. Mass. 1981). Courts regard corporations as public figures. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220, 227 (1986) (corporation selling meat products qualified as public figure because it conducted intensive advertising campaign to attract customers); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (corporation subject to state regulation qualified as public figure because it owned over a billion dollars in assets in offering its stock at public sale). As a result, courts have required plaintiff manufacturers to show actual malice in product disparagement actions, especially when the product is intended for human consumption or otherwise affects public health. *Dairy Stores*, 216 A.2d at 228-29.

Other courts have suggested, however, that the term "public figure" does not readily apply to corporations or products. See *Dairy Stores*, 104 N.J. 125, 516 A.2d 220, 227 (1986). Public figures include private figures who are so involved in a particular public controversy that they become public figures for a limited range of issues. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418

court based its decision on two determinations. First, the *Bose* court noted that court decisions involving similar facts held that the *New York Times* standard applies outside the personal defamation context.¹⁹⁷ Although those courts applied the standard to corporate defamation actions, the statements made by the defendants actually disparaged the quality of the corporate plaintiffs' products.¹⁹⁸ Second, the *Bose* court applied the *New York Times* balancing test to determine that in product disparagement actions, the concern for compensating injury to reputation is less than in personal defamation actions because the statements disparage only the product itself.¹⁹⁹ The interest in free speech and press, the court stated, is more important in product disparagement cases than in personal defamation actions because consumer interest is essential.²⁰⁰

II. CURRENT STATE OF TEXAS LAW

A. Cause of Action in Texas

The Texas Civil Practice and Remedies Code (the Code) provides a private cause of action for libel.²⁰¹ Section 73.001 of the Code, which sets forth the elements of libel, defines libel as a written defamation that injures the reputation of another.²⁰² Accordingly the statute on its face applies only to

U.S. 323, 351-52 (1974)). The *Dairy Stores* court observed that product manufacturers and sellers are interested only in selling their products and not interested in becoming involved with public controversies. *Dairy Stores*, 516 A.2d at 227. According to the *Dairy Stores* court, therefore, the public figure test provides an inappropriate method for determining whether statements about corporations and their products constitute actionable defamation. *Id.* at 228; see *Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 589-90 (1st Cir. 1980) (sale of product cannot easily be deemed public controversy; health and safety information not basis for applying actual malice standard to boat safety criticism); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 956 (D.D.C. 1976) (rejecting public figure analysis as inappropriate model for product disparagement cases); *Vegod Corp. v. American Broadcasting Co.*, 25 Cal. 3d 763, 160 Cal. Rptr. 87, 603 P.2d 14 (1979), *cert. denied*, 449 U.S. 886 (1980) (person in business world advertising his wares does not necessarily become part of public controversy).

197. *Bose*, 508 F. Supp. at 1270.

198. *Dairy Stores*, 104 N.J. 125, 516 A.2d 220 (1986) (citing *Steaks Unlimited, Inc. v. Deaner*, 612 F.2d 264, 280 (television report disparaged quality of corporate plaintiff's meat and criticized its business practices); *F&J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc.*, 373 F. Supp. 292, 296-97 (N.D. Ohio 1974) (report disparaged corporate plaintiffs "Krazy Straw" product).

199. *Bose*, 508 F. Supp. at 1270; see Note, *Did Bose Speak Too Softly: Product Critiques and The First Amendment*, 14 HOFSTRA L. REV. 571 (1986).

200. 508 F. Supp. at 1270-71; see *Dairy Stores*, 516 A.2d at 222 (discussing application of *New York Times* doctrine to corporate libel cases); see also Carman, *Hutchinson v. Proxmire and The Neglected Fair Comment Defense*, 30 DEPAUL L. REV. 1, 10-37 (1980); Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35, 37 (1982); Comment, *supra* note 187, at 760-61.

201. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).

202. *Id.* Section 73.001 of the Code provides:

[L]ibel is a defamation expressed in written or other graphic form that tends too injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Id.

defamation actions.²⁰³ Furthermore, because the statute specifically requires injury to personal reputation,²⁰⁴ product disparagement claims fall outside the scope of the statute.²⁰⁵ Nevertheless, the Texas Legislature has failed to enact any statute providing a private cause of action for product disparagement. As a result, plaintiffs must look to Texas courts to determine whether state common law recognizes an action for product disparagement.

In *Jetco Electronic Industries, Inc. v. Gardiner*²⁰⁶ the Fifth Circuit Court of Appeals considered whether a plaintiff may recover for product disparagement under Texas law.²⁰⁷ The plaintiff in *Jetco* brought suit to recover damages and to enjoin the publication of false statements concerning the efficacy of the *Jetco* hand-held metal detector. The *Jetco* trial court stated that although many jurisdictions recognized a cause of action for product disparagement or trade libel at common law,²⁰⁸ Texas courts have failed to follow suit.²⁰⁹ On appeal, the Fifth Circuit reiterated that the Texas libel statute governed all libel actions in the state.²¹⁰ The *Jetco* court cited *Deen v. Snyder*²¹¹ as authority for its conclusion that the libel statute provides the definitive definition of defamation²¹² and that the Texas courts may not enact an alternate definition of defamation.²¹³ *Jetco* alleged only that Gardiner had printed false and defamatory statements about *Jetco's* product.²¹⁴ *Jetco's* complaint alleged a cause of action for false disparagement.²¹⁵ Moreover, *Jetco* neither characterized its claim as one for defamation or libel nor alleged that Gardiner injured the reputation of *Jetco* or its owner. The *Jetco* court, nevertheless, found *Jetco's* action to constitute a claim for libel under the Texas statute because the statements, if false, would injure the reputation of *Jetco* or its owner.²¹⁶

The *Jetco* trial court held that *Jetco* also presented a cause of action under Texas law for slander of property.²¹⁷ The court chose not to address this

203. See *Cranberg v. Consumers Union of U.S., Inc.*, 756 F.2d 382, 389 (5th Cir. 1985); *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1233 (5th Cir. 1973) *aff'g*, 325 F. Supp. 80, 84 (S.D. Tex. 1971). For a discussion of the *Jetco* case, see *infra* notes 206-23 and accompanying text.

204. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986); see *supra* note 202.

205. *Cranberg*, 756 F.2d at 389; *Jetco*, 325 F. Supp. at 84.

206. 473 F.2d 1228 (5th Cir. 1973), *aff'g*, 325 F. Supp. 80 (S.D. Tex. 1971).

207. 473 F.2d at 1233.

208. 325 F. Supp. at 84.

209. *Id.*

210. *Id.* At the time of decision the Texas libel statute was set forth in article 5430 of the Texas Revised Civil Statutes. TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958). Section 73.001 of the codified statute is virtually identical to article 5430. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).

211. 57 S.W.2d 338 (Tex. Civ. App.—Fort Worth 1932, no writ).

212. 473 F.2d at 1233.

213. *Id.*

214. *Id.*

215. 325 F. Supp. at 84.

216. *Id.* In Texas, whether a disparaging statement about a plaintiff's product also injures business and is therefore actionable defamation or libel depends on whether the statement implied reprehensible conduct on the part of the owner. *Young v. Kuhn*, 17 Tex. 645, 9 S.W. 860 (1886); accord *Hibschman*, *supra* note 2, at 631 (discussing Texas law).

217. *Jetco*, 325 F. Supp. at 84.

alternative cause of action, however, but to analyze Jetco's claim as one for libel because the statutory libel action required no special showing.²¹⁸ The *Jetco* court cited *Houston Chronicle Publishing Co. v. Martin*²¹⁹ for its assertion that Jetco could recover for slander of property.²²⁰ In *Houston Chronicle* a Texas appeals court held that a false statement disparaging Martin's goods was actionable despite the fact that the statement did not defame Martin's reputation.²²¹ The *Houston Chronicle* court reasoned that although words spoken regarding property do not in themselves constitute an actionable offense, a disparagement of Martin's property might injure Martin as seriously as a personal defamation of Martin.²²² The *Houston Chronicle* court set forth the elements of an action for slander of property, stating that a plaintiff must show falsity, malice, and special damages.²²³

In *Cranberg v. Consumers Union of U.S., Inc.*²²⁴ the Fifth Circuit again addressed the issue of whether a product disparagement plaintiff presents a valid claim under Texas law.²²⁵ The *Cranberg* court examined product disparagement and libel claims against Consumers Union for statements published in a review of Cranberg's product, the Texas Fireframe.²²⁶ In connection with its consideration of the plaintiff's product disparagement claim, the *Cranberg* court concluded that Texas precedent made it uncertain whether Texas recognized a cause of action for product disparagement or trade libel.²²⁷ Accordingly, the court turned to an analysis of the plaintiff's libel claim, citing *Deen v. Snyder*²²⁸ for the proposition that no other definition of libel governs defamation or disparagement actions in Texas.²²⁹ The court followed the rule that all libel actions in Texas are governed by the state libel statute. Moreover, the court recognized that the Texas statute defines libel only in terms of injury to a person.²³⁰ The *Cranberg* court, however, relied on *Newspapers, Inc. v. Matthews*²³¹ for the proposition that a publication which refers to an identifiable individual may defame the owner

218. See *id.* If the court had not found that the statements were defamatory, it would have decided the case as a slander of property action. *Id.* The *Jetco* court declined to state whether Jetco might have asserted a cause of action under the Lanham Act, but cited *Smith-Victor Corp. v. Sylvania Elec. Products, Inc.*, 242 F. Supp. 302 (N.D. Ill. 1965) as authority on the issue. 325 F. Supp. at 84.

219. 5 S.W.2d 170 (Tex. Civ. App.—El Paso 1928, writ *dism'd*).

220. 325 F. Supp. at 84.

221. 5 S.W.2d at 173 (citing M. NEWELL, *SLANDER AND LIBEL* § 230 (4th ed. 1924)).

222. *Id.* at 173.

223. *Id.* According to the *Houston Chronicle* court, the special damages must be "proximately, naturally, and reasonably resulting to the owner of the property." *Id.* The court stated that special damages constituted the principal component of the slander of property action. *Id.*

224. 756 F.2d 382 (5th Cir. 1985).

225. *Id.* at 389.

226. *Id.* The Texas Fireframe is a double-decked fireplace grate that the plaintiff developed and patented and that the plaintiff's sole proprietorship manufactured and sold.

227. *Id.* (citing *Jetco*, 325 F. Supp. at 84).

228. 57 S.W.2d 338 (Tex. Civ. App.—Fort Worth 1932, no writ); see *supra* notes 211-13 and accompanying text.

229. *Cranberg*, 756 F.2d at 389.

230. *Id.*

231. 339 S.W.2d 890 (1960); see *infra* notes 312-14 and accompanying text.

of a business, without naming him, if readers could discern from the statement that it referred to the owner.²³² As a result, the court ruled that *Cranberg* presented a valid cause of action under the Texas libel statute.²³³

Following this logic, a product disparagement plaintiff could argue that statements referring to the product impliedly identified, and thereby defamed, the plaintiff, despite the fact that the publication did not actually name the plaintiff. The plaintiff could further contend that disparagement of the product necessarily amounted to defamation of the individual or corporate plaintiff because the plaintiff owned the company that manufactured the product. Even if Texas courts refuse to permit plaintiffs to bring product disparagement claims under the libel statute,²³⁴ however, the *Jetco* and *Houston Chronicle* decisions indicate that Texas plaintiffs may bring product disparagement claims as actions for slander of property.²³⁵ In *Russell v. Campbell*²³⁶ a Texas court of appeals set forth the elements of the action for slander of property or of title to property. According to the court, the plaintiff must allege and prove: (1) publication of the disparagement; (2) falsity of the statement published; (3) the defendant's malice; (4) special damages sustained by the plaintiff; and (5) the plaintiff's interest in the property disparaged.²³⁷ Texas courts have consistently recognized and enforced the

232. *Id.* at 893-94; see *Gibler v. Houston Post Co.*, 310 S.W.2d 377, 381-85 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); *Red River Valley Publishing Co. v. Bridges*, 254 S.W.2d 854, 858-60 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.). If a publication is clearly defamatory to some person but does not refer to a specific person, the plaintiff bears the burden of pleading and proving by way of the colloquium that the publication concerned the plaintiff. PROSSER & KEETON, *supra* note 1, § 111. In *Matthews* the publications stated that a professional car wrecking ring was operating out of a local body shop and that charges had been filed against two men who operated the Texas Body Shop. The publications named the two operators. Matthews had purchased the Texas Body Shop from the two men named in the article, but the men remained as Matthews' employees. Although the article did not name Matthews, Matthews contended that it fairly could be understood to refer to him, because it mentioned his shop and referred to its operators, and because Matthews was known to be the shop's owner. The court held that because the articles explicitly named the two men as the operators of the shop, and because the article pointed to them as the operators of the shop as a front for their activities, rather than to Matthews, the articles were not libelous as to Matthews. *Matthews*, 339 S.W.2d at 894.

233. 756 F.2d at 389.

234. Courts may be reluctant to impute a lack of integrity to a business owner merely from criticism of its products. *Dairy Stores*, 516 A.2d at 224; see Note, *Corporate Defamation*, *supra* note 3, at 970-71; Note, *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1499 (1969). In fact, courts have gone to some lengths in refusing to imply an accusation of personal inefficiency or incompetence directed against businesses or their products, particularly when the statement charges the plaintiff with mere ignorance or negligence. *Polygram Records, Inc. v. Superior Ct.*, 170 Cal. App. 3d 543, 550, 216 Cal. Rptr. 252, 256 (1985) (citing PROSSER & KEETON *supra* note 1, § 128).

False statements indicating that the plaintiff's business or goods were inferior are not defamatory because they do not accuse the plaintiff of dishonesty, lack of integrity or incompetence, or imply any reprehensible personal characteristic. *Polygram Records*, 170 Cal. App. 3d at 550, 216 Cal. Rptr. at 256.

235. For a discussion of slander of property, see *supra* notes 194-200 and accompanying text.

236. *Russell v. Campbell*, 725 S.W.2d 739, 749 (Tex. App.—Houston [14th Dist.] 1987, no writ) (citing *Clark v. Lewis*, 684 S.W.2d 161, 163-64 (Tex. App.—Corpus Christi 1984, no writ)).

237. *American Nat'l Bank & Trust Co. v. First Wis. Mortg. Trust*, 577 S.W.2d 312, 316

established law in actions for slander of property or title.²³⁸ Although most cases involved disparagement of a plaintiff's title to real property, the courts recognized that the cause of action also applied to slander of a plaintiff's title to personal property and to slander of the quality of a plaintiff's goods.²³⁹

Texas courts also have applied the cause of action for slander of title to cases involving business disparagement.²⁴⁰ In *Ward v. Gee*²⁴¹ Ward falsely asserted that he was the owner of a grocery store and that Gee merely managed the business for him. In a suit brought by Ward to receive the business, Gee denied that Ward owned the grocery store and counter-sued Ward for defamation. Upon consideration of the facts in *Ward*, the Eastland court of appeals held that the false statements failed to give rise to an action for defamation.²⁴² Because the false statements related to Ward's ownership of the business, however, the court reasoned that the statements did create an action for slander of title to his property.²⁴³ The *Ward* court further reasoned that under *Houston Chronicle*, disparagement of property or of title to property is actionable when special damages result.²⁴⁴ The *Ward* court ruled that injury to Gee's business constituted the sole source of special damages.²⁴⁵

In *Page v. Layne-Texas Co.*²⁴⁶ the Galveston court of appeals expanded liability for business disparagement.²⁴⁷ Layne-Texas was a water and sewer systems drilling subcontractor for Page. After a dispute developed between the parties, Layne-Texas filed a false claim with Page's bonding company that substantially impaired Page's vital bonding credit. Page filed a tort action against Layne-Texas alleging that the false statements constituted business disparagement, injurious falsehood, and unlawful interference with a

(Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); accord *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983); *A.H. Belo Corp. v. Sanders*, 632 S.W.2d 145, 145-46 (Tex. 1982); *Shell Oil Co. v. Howth*, 138 Tex. 357, 159 S.W.2d 483, 490-92 (1942).

238. *A.H. Belo Corp. v. Sanders*, 632 S.W.2d 145, 145-46 (Tex. 1982) (citing *Shell Oil Co. v. Howth*, 138 Tex. 357, 159 S.W.2d 483 (1942)); accord, *Ellis*, 656 S.W.2d at 905; *Russell*, 725 S.W.2d at 749; *American Nat'l Bank & Trust*, 577 S.W.2d at 316.

239. See *Jetco Elec. Indus. v. Gardiner*, 325 F. Supp. 80, 85 (5th Cir. 1971) (citing *Houston Chronicle Publishing Co. v. Martin*, 5 S.W.2d 170, 173 (Tex. Civ. App.—El Paso 1928, writ dismissed)); *M. NEWELL*, *supra* note 221, at 196. Reliance on slander of title cases in determining product disparagement law is justified, in any event, by the fact that in both torts the defendant's statements impair the vendibility of the object the plaintiff seeks to sell. *System Operations v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1140 (3d Cir. 1977) (applying New Jersey law). The similarity between the two torts is such that the law of one is usually imparted without restraint into cases involving the other. *Id.* (concluding that New Jersey court adjudicating product disparagement case would follow state precedents in slander of title cases as well as in product disparagement cases).

240. See *Ward v. Gee*, 61 S.W.2d 555, 556 (Tex. Civ. App.—Eastland 1933, writ ref'd); *Page v. Layne-Texas Co.*, 258 S.W.2d 366, 368-69 (Tex. Civ. App.—Galveston 1953, writ dismissed by agr.).

241. 61 S.W.2d 555 (Tex. Civ. App.—Eastland 1933, writ ref'd).

242. *Id.* at 536.

243. *Id.*

244. *Id.* (citing *Houston Chronicle*, 5 S.W.2d 170 (Tex. Civ. App.—El Paso 1928, writ dismissed)).

245. *Id.* at 556-57.

246. 258 S.W.2d 366 (Tex. Civ. App.—Galveston 1953, writ dismissed by agr.).

247. See *id.* at 368-69.

business enterprise.²⁴⁸ The *Page* court held that any willful and unjustified interference with the business of another is actionable despite the fact that such interference may not constitute statutory slander or libel.²⁴⁹ Although the court spoke in terms of tortious interference with economic relations, it implied that disparagement claims are actionable even though they fall outside the scope of the Texas libel statute.²⁵⁰ Product disparagement plaintiffs could argue under *Page*, therefore, that malicious false statements about their products constitute actionable intentional business interference.²⁵¹

The most recent Texas case involving business disparagement is *Gulf Atlantic Life Insurance Co. v. Hurlbut*.²⁵² In that case, the president of Gulf Atlantic made statements to the assistant attorney general alleging that Hurlbut and another insurance agent, both of whom were former employees of Gulf Atlantic, were engaged in fraudulent and illegal business activities. Hurlbut brought an action for fraud, business disparagement, and tortious interference with a contract right. In *Gulf Atlantic* the Dallas court of appeals identified the difference between an action for defamation and an action for disparagement.²⁵³ Specifically, the *Gulf Atlantic* court cited *Newspapers, Inc. v. Matthews*²⁵⁴ for the proposition that defamation of a business is not actionable, although defamation of its owner does give rise to a claim.²⁵⁵ Furthermore, the court of appeals asserted that disparagement of a business does constitute a valid cause of action under Texas law.²⁵⁶ On appeal, the Texas Supreme Court supported the court of appeals' contention that Texas recognizes a cause of action for business disparagement.²⁵⁷ The supreme court stated that the elements of this cause of action include: publication by the defendant, falsity, malice, lack of privilege, and special damages.²⁵⁸

Gulf Atlantic contended that the one-year statute of limitations for libel and slander actions barred Hurlbut's business disparagement claim because the defamatory statements provided the basis for the disparagement action.²⁵⁹ Hurlbut stipulated that the statute barred any libel or slander claim,

248. *Id.* at 368.

249. *Id.* at 369; see Note, *Interference with Prospective Business Relationship: An Old Tort For The New Marketplace*, 35 BAYLOR L. REV. 123, 125-35 (1983).

250. See 258 S.W.2d at 369.

251. An argument would be more difficult for a non-competitor to make, however, because a non-competitor plaintiff would not easily be able to prove a defendant's intent to interfere with its business.

252. 749 S.W.2d 762 (Tex. 1987), *rev'g on other grounds and remanding* 696 S.W.2d 83 (Tex. App.—Dallas 1985).

253. 696 S.W.2d at 96-97.

254. 161 Tex. 284, 289 S.W.2d 890, 893 (1960); see *supra* notes 232-33 and accompanying text.

255. 696 S.W.2d at 96.

256. *Id.* (citing *Page v. Layne-Texas Co.*, 258 S.W.2d 366, 369 (Tex. Civ. App.—Galveston 1953, writ *dism'd by agr.*)).

257. *Gulf Atlantic*, 762 S.W.2d at 766.

258. *Id.* (citing J. FLEMING, *THE LAW OF TORTS* 697-700 (5th ed. 1977)).

259. 696 S.W.2d at 93. The Texas statute of limitations for libel or slander requires that plaintiffs commence actions for injuries to their character or reputation by libel or slander within one year after the cause of action accrues. TEX. REV. CIV. STAT. ANN. art. 5524(i) (Vernon 1958).

but contended that it did not bar a disparagement claim.²⁶⁰ The *Gulf Atlantic* court of appeals acknowledged that it had to decide whether Hurlbut actually stated a defamation claim or a disparagement claim.²⁶¹ In determining the nature of Hurlbut's claim, the court of appeals examined the facts alleged in the petition, the evidence presented in support of the allegations, and the type of damages alleged and proved.²⁶² The court thereby affirmatively elected to consider the substance of the claim rather than the designation of the claim in the pleadings as an action for disparagement.²⁶³

To determine whether the statute of limitations for defamation also applies to disparagement, the *Gulf Atlantic* court of appeals looked to decisions from other jurisdictions. The court specifically noted that New York courts apply the statute of limitations for libel and slander claims to disparagement actions whenever the statement is personally defamatory as well as damaging to business or property interests.²⁶⁴ The *Gulf Atlantic* court of appeals, however, refused to follow the New York rule.²⁶⁵ Instead, the court of appeals held that in determining whether the statute of limitations for libel and slander applies to disparagement claims, the test is whether the gist of the tort is an injury to the plaintiff's personal reputation or whether it is a direct injury to his business or property.²⁶⁶ The two critical factors identified by the court of appeals include the type of allegations that the plaintiff makes and the type of damages it seeks.²⁶⁷ Under the court of appeals' test, therefore, if the principal complaint is a false accusation of personal misconduct and the damages alleged and proved primarily are general damages to the plaintiff's personal reputation, the claim is for libel or slander and falls under the statute of limitations for such claims.²⁶⁸ If, however, the principal complaint is a false statement that directly injures a business or property interest and the damages alleged and proved seek recovery for specific injuries to the plaintiff's business or property, the claim is for business or property disparagement despite the fact that the statements also may have personally defamed the plaintiff consequentially.²⁶⁹ Applying this test, the *Gulf Atlantic* court of appeals held that Hurlbut's claim constituted a libel or slander action and, consequently, was barred by the statute of limitations applicable to libel and slander claims.²⁷⁰ Upon its review of the *Gulf Atlantic* court of appeals' decision, the Texas Supreme Court found no reversible

260. 696 S.W.2d at 93.

261. *Id.* at 93, 97-99.

262. *Id.* at 97.

263. *Id.* Otherwise, the court reasoned, defamation plaintiffs could avoid the statute of limitations simply by alleging that the defamatory statement was a disparagement. *Id.*

264. *Id.* (citing *Dubourcq v. Brouwer*, 124 N.Y.S.2d 67, 72 (Sup. Ct. 1953), *aff'd*, 282 A.D. 861, 127 N.Y.S.2d 842, *aff'd*, 283 A.2d 942, 131 N.Y.S.2d 300 (1953)).

265. 696 S.W.2d at 98.

266. *Id.* at 98. Under the court of appeals decision in *Gulf Atlantic* the statute of limitations for defamation applies only to those disparagement actions that are merely incidental to defamation and does not apply to all disparagement actions that involve defamation. *See id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 98-99.

error in the court of appeals' conclusion that Hurlbut's claim for business disparagement essentially constituted a claim for slander.²⁷¹ Noting that Gulf Atlantic's claim amounted in substance to a claim for personal damages rather than for special damages in the form of pecuniary losses, such as lost sales, the supreme court accepted the court of appeals' characterization of the cause of action as an action for slander.²⁷² As a result, the supreme court also affirmed the court of appeals' determination that the claim was barred by the statute of limitations for slander actions.²⁷³

Justice Akin, in a dissent to the majority opinion of the court of appeals in *Gulf Atlantic*, disagreed with the majority's decision to re-classify the disparagement claim as a claim for libel or slander.²⁷⁴ The dissent contended that the majority ignored the fact that Hurlbut pleaded and proved the elements of a disparagement claim, submitted special issues to the jury regarding the disparagement claim, and obtained favorable answers to those issues.²⁷⁵ The dissent emphasized that plaintiffs may choose the type of claim they wish to make as long as they present pleadings sufficient to give the opposing attorney notice of the claim asserted.²⁷⁶ The fact that Hurlbut chose not to make a claim for defamation should not prevent him from bringing a disparagement action if he could prove the disparagement, the dissent concluded.²⁷⁷

B. Availability of Federal Statutory Remedies for Product Disparagement in Texas

In *Jetco* the Fifth Circuit declined to express an opinion as to whether Jetco stated a cause of action under section 43(a) of the Lanham Act.²⁷⁸ The *Jetco* court, however, cited *Smith-Victor Corp. v. Sylvania Electronic Products, Inc.*,²⁷⁹ which held that the Lanham Act affords a private cause of action for product disparagement plaintiffs.²⁸⁰ Nevertheless, the Fifth Circuit in *Cranberg* indicated that product disparagement plaintiffs could not sue under the Lanham Act.²⁸¹ The *Cranberg* court stated that the Lanham Act covers only those situations in which a manufacturer makes false statements about its own products.²⁸² Accordingly, the court asserted that Cranberg's proposed amendment of his complaint to include a claim under the Lanham Act would be futile.²⁸³

The Texas courts have not addressed whether a product disparagement

271. *Gulf Atlantic*, 749 S.W.2d at 766.

272. *Id.*

273. *Id.*

274. 696 S.W.2d at 106.

275. *Id.*

276. *Id.* (citing *Castelberry v. Gollis Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981)); see TEX. R. CIV. P. 45, 47.

277. *Gulf Atlantic*, 696 S.W.2d at 107.

278. *Jetco*, 325 F. Supp. at 85. For a discussion of the *Lanham Act*, see *supra* notes 107-23 and accompanying text.

279. 242 F. Supp. 302 (N.D. Ill. 1965); see *supra* notes 116-23 and accompanying text.

280. *Jetco*, 325 F. Supp. at 85.

281. *Cranberg*, 756 F.2d at 392.

282. *Id.*

283. *Id.*

plaintiff may bring a private cause of action under the FTC Act. It is unclear, therefore, whether Texas courts would grant a cause of action under the FTC Act to noncompetitors.²⁸⁴ Texas courts probably would follow the general rule, however, that competitors have no such private action under the FTC Act.²⁸⁵

C. Injunctive Relief in Texas

Texas follows the rule set forth in *Marlin Firearms Co. v. Shields* that equity will not enjoin defamation or disparagement.²⁸⁶ In *McMorries v. Hudson Sales Corp.*,²⁸⁷ however, a Texas court of appeals held that equity would enjoin disparagement only when necessary to protect property interests threatened by other tortious or illegal acts that used the disparagement as a means to an unlawful end.²⁸⁸ The *McMorries* court held that equity would not enjoin W.E. McMorries from driving his car that he had covered with writing disparaging the car. The court reasoned that Hudson failed to allege that McMorries knew the statements to be false or that McMorries attempted to interfere with Hudson's business by using statements to intimidate or coerce Hudson.²⁸⁹ Other Texas courts have held that injunctions may issue if the defendant made the disparaging statements pursuant to, or in connection with, conspiracy, intimidation, coercion, extortion, or any criminal act.²⁹⁰ Moreover, Texas courts will enjoin disparagement upon a showing of breach of trust or of contract.²⁹¹

In *Carter v. Bradshaw*²⁹² the court went beyond the distinctions identified by the *Lawrence* and *McMorries* courts and held that injunctions may issue to restrain disparagement whenever the disparagement is prejudicial to the party seeking the injunctive relief.²⁹³ The *Bradshaw* court relied on *Hawks v. Yancy*²⁹⁴ in stating that the rule that equity will not afford injunctive relief is known by its breach rather than by its observance.²⁹⁵ The *Bradshaw* court

284. See *supra* notes 97-109 and accompanying text.

285. See *id.*

286. Ex parte Tucker, 110 Tex. 335, 220 S.W. 75, 76 (1920); see *supra* text accompanying notes 128-55 (discussing *Marlin* rule and development of law of equitable relief in disparagement cases); accord *Strong v. Biggers*, 252 S.W. 826 (Tex. Civ. App.—Dallas 1923, no writ); *Mitchell v. Grand Lodge, Free & Accepted Masons*, 56 Tex. Civ. App. 306, 121 S.W. 178, 179-80 (1909).

287. 233 S.W.2d 938 (Tex. Civ. App.—El Paso 1950, no writ).

288. *Id.* at 941.

289. *Id.* at 941-42; see *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 637 (1937) (court issued injunction against car owner because he knew statements on his car were false); see also *Carpenters & Joiners Union v. Ritter's Cafe*, 138 S.W.2d 223 (Tex. Civ. App.—Galveston 1940, no writ) (court issued injunction against union because it sought to force Ritter's Cafe to breach contract with third party by picketing); *Gilbralter Sav. & Bldg. Ass'n v. Jobell*, 101 S.W.2d 1029 (Tex. Civ. App.—Galveston 1937, no writ) (denying injunction because statement was mere libel without other tortious or illegal act involved).

290. *Lawrence v. Atwood*, 295 S.W.2d 298, 300 (Tex. Civ. App.—Beaumont 1956, no writ).

291. *Id.*

292. 138 S.W.2d 187 (Tex. Civ. App.—Amarillo 1940, no writ).

293. *Id.* at 191.

294. 265 S.W. 233, 237 (Tex. Civ. App.—Dallas 1924, no writ).

295. *Carter v. Bradshaw*, 138 S.W.2d 187, 190 (Tex. Civ. App.—Amarillo 1940, no writ).

further stated that the traditional rule is a mere fiction and that the personal rights of individuals are more valuable than property or money.²⁹⁶

The most recent Texas case involving the issuance of injunctions to restrain product disparagement is *Hajek v. Bill Mowbray Motors, Inc.*²⁹⁷ Mowbray sought to enjoin Hajek from publishing or circulating defamatory statements that were painted on a van he purchased from Mowbray. The painted statements included several representations of lemons.²⁹⁸ The *Hajek* court relied on *Carter v. Knapp Motor Co.*²⁹⁹ and *McMorries*³⁰⁰ in holding

296. *Id.* at 191.

297. 647 S.W.2d 253 (1983).

298. The statements printed on Hajek's van included the following: "Jerry Roberts sold this (representation of a lemon) Disaster (representation of a lemon) at Bill Mowbray Motors Inc. Help! It's a Dog!" *Hajek*, 645 S.W.2d 827, 829 (Tex. App.—Corpus Christi 1982), *rev'd*, 647 S.W.2d 253 (Tex. 1983).

The court found that Hajek falsely characterized the van as a lemon. *Hajek*, 645 S.W.2d at 832. Many consumers, however, have purchased automobiles that truly were defective and that might accurately have been characterized as lemons. See Comment, *A New Twist For Texas "Lemon" Owners*, 17 ST. MARY'S L.J. 155, 155-56 (1985) (consumers have far more complaints regarding new automobiles than about any other product) [hereinafter Comment, *A New Twist*]; see also Pertschuk, *Consumer Automobile Problems*, 11 U.C.C.L.J. 145, 146 (1978) (FTC statistics indicate considerable consumer dissatisfaction with new cars); Whitford, *Law and the Consumer Transaction: A Case Study of The Automobile Warranty*, WIS. L. REV. 1006, 1032 (1968) (*Consumer Reports* survey revealed that consumer's most common complaints related to dealers' failure to cooperate and dealers' inability to successfully repair cars). The Texas legislature passed a statute in 1983 to provide a remedy for consumers who purchase defective automobiles, or "lemons." TEXAS REV. CIV. STAT. ANN. art. 4413(367), § 6.07 (Vernon Supp. 1985). Most states also have passed lemon laws setting forth warranty performance obligations. Hannigan, *The New "Lemon Laws": Expanding U.C.C. Remedies*, 17 U.C.C.L.J. 116, 118-19 (1984); Goldberg, *New Mexico's "Lemon Law": Consumer Protection or Consumer Frustration?*, 16 NEW MEX. L. REV. 251 (1986); Comment, *A New Twist, supra*, at 156; Note, *Nebraska's "Lemon Law": Synthesizing Remedies for the Owner of a "Lemon,"* 17 CREIGHTON L. REV. 345, 372-73 (1984); see Comment, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, ARIZ. ST. L.J. 589 (1985); Comment, *Remedies Available to The Purchaser of a Defective Used Car*, 47 MONT. L. REV. 273 (1986); Comment, *Virginia's Lemon Law: The Best Treatment For Car Owners*, 19 U. RICH. L. REV. 405 (1984); Comment, *Retail Sellers and The Enforcement of Manufacturer Warranties: An Application of The UCC to Consumer Product Distribution Systems*, 32 WAYNE L. REV. 1049 (1986). The Texas legislature wanted to provide a clearly defined cause of action against the manufacturer through an inexpensive, accessible dispute resolution system. See Comment, *A New Twist, supra*, at 165-66. The Texas lemon law requires that a consumer submit to the Texas Motor Vehicle Commission for a hearing on the merits as a prerequisite to the consumer's use of the lemon presumption. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985). Texas is the only state that requires a formal administrative hearing. See Comment, *A New Twist supra*, at 157, 166. Other states provide for informal dispute resolution. *Id.* at 157, n.12.

Generally, the lemon law provides that a consumer has a direct cause of action against the automobile manufacturer for replacement of the lemon or a refund of the purchase price when the vehicle does not conform to its express warranty after a reasonable number of attempts at repair. TEX. REV. CIV. STAT. ANN. art. 4413(36), § 6.07(e) (Vernon Supp. 1985). The statute specifically provides that if a new car does not conform to the manufacturer's express warranties and the car owner reports the nonconformity to the manufacturer or dealer within the prescribed time period, the manufacturer or dealer must make any necessary repairs to conform the vehicle to the warranty. *Id.* A reasonable number of attempts to repair are presumed to have been made when the same defect is subject to unsuccessful repair for at least four times or when the car has been out of service for repair for at least thirty days during the prescribed time period. *Id.*; see Comment, *A New Twist, supra*, at 168-89.

299. 243 Ala. 600, 11 So. 2d 383 (1943); see *supra* notes 134-46 and accompanying text.

300. *Menard v. Haule*, 298 Mass. 546, 11 N.E. 2d 436 (1937); *Saxon Motor Sales, Inc. v.*

that an injunction could issue to restrain Hajek's disparagement of Mowbray.³⁰¹ The lower court emphasized that Mowbray's property interests were at risk and that Hajek exhibited a coercive intent.³⁰² The Texas Supreme Court reversed, holding that the constitutional guaranty of free speech and press prohibited the issuance of injunctions to restrain defamation or disparagement.³⁰³

D. Defenses in Texas

Section 73.005 of the Code provides that truth is a defense to defamation actions.³⁰⁴ The statute further provides that defenses existing at common law or pursuant to statutes shall continue to be effective.³⁰⁵ Defenses existing prior to or outside of the libel statute, therefore, apply to disparagement actions whether they are brought under the statute or at common law. These defenses include truth, common law privilege, and constitutional privilege.

III. RECOMMENDATIONS TO THE TEXAS SUPREME COURT

A. Recognize that the Texas Libel Statute does not Preclude Common Law Product Disparagement Liability

The logic of the *Jetco* decision is flawed. The court failed to recognize that although the Texas libel statute may govern all libel actions and may offer a complete definition of libel, the libel statute does not necessarily govern disparagement actions. Libel actions are claims for injurious falsehoods that harm the interests of the plaintiff as a person.³⁰⁶ The fact that the Texas legislature chose to provide a statutory cause of action for libel, therefore, does not necessarily indicate that the legislature intended to eliminate common law disparagement actions. The obvious intent of the legislature in enacting the libel statute was to afford libel plaintiffs a simple remedy and to accommodate and protect libel plaintiffs. The legislature did not intend to eliminate all remedies that are not within the statute and thereby to increase

Torino, 166 Misc. 863, 2 N.Y.S.2d 885 (N.Y. Sup. Ct. 1938). An injunction is proper to protect natural and contractual rights from interference by verbal or written threats. *McMorries*, 233 S.W.2d at 940-42; see *Lloyd & KDFW-TV v. Alaska Worldwide, Inc.*, 550 S.W.2d 343 (Tex. Civ. App.—Dallas 1977, no writ); *Hotel & Restaurant Employees' Int'l Alliance & Bartenders Int'l League of Am. v. Longley*, 160 S.W.2d 124 (Tex. Civ. App.—Eastland 1942, no writ).

301. *Hajek*, 645 S.W.2d at 834. But see *Lawrence v. Atwood*, 295 S.W.2d 298, 300 (Tex. Civ. App.—Beaumont 1956, no writ) (equity will not enjoin defendant's display of sign that disparaged home builder's houses through words and painting of lemons).

302. 645 S.W.2d at 834.

303. 647 S.W.2d at 255. The court relied on article I, section 8 of the Texas Constitution. TEX. CONST. art. I, § 8. Section 8 provides that every person shall be at liberty to speak, write, or publish his opinions on any subject, but that he shall be responsible for the abuse of that privilege, and that no law shall ever curtail the liberty of speech or of the press. *Id.* The *Hajek* court also relied on *Ex Parte Tucker*, 110 Tex. 335, 220 S.W. 75, 76 (1920) (equity will not intervene to restrain constitutionally guaranteed free speech or press).

304. TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (Vernon 1986).

305. *Id.* § 73.006.

306. See *supra* notes 1-2 and 8-16 and accompanying text.

plaintiffs' burdens. The Texas Supreme Court, therefore, should recognize that the state libel statute does not preclude product disparagement claims.

B. Do Not Apply the Statute of Limitations for Libel and Slander Actions to Product Disparagement Claims

Just as the libel statute should not govern disparagement actions, the statute of limitations applicable to statutory libel and slander claims should not apply to common law disparagement claims. The statute of limitations appropriately applies to statutory defamation actions because the statutory remedy allows plaintiffs to recover without making any special showings. The statute of limitations for defamation restores the balance between the interests of plaintiffs and defendants in defamation actions. Applying the statute of limitations to common law disparagement actions, however, would destroy that balance by limiting the availability of remedies for which plaintiffs must make special showings. The statute of limitations would afford too much protection to product disparagement defendants, who already are protected by the requirements that product disparagement plaintiffs make special showings and bear the burden of proof of those showings.³⁰⁷

307. A California appeals court recently examined the issue of whether to apply the state's one-year statute of limitations for libel and slander to actions for product disparagement or trade libel. In *Guess, Inc. v. Superior Court*, 176 Cal. App. 3d 474, 222 Cal. Rptr. 79, 83 (1986), the court held that the one-year libel and slander statute of limitations did not apply to trade libel claims. Instead, the *Guess* court applied the two-year statute of limitations that governs actions on contracts and on other obligations or liabilities. *Id.* The court relied upon the distinction made by PROSSER & KEETON, *supra* note 1, § 128, and consistent with the California courts' decisions, between defamation and disparagement. *Id.* at 82-83; *see supra* note 2. The court emphasized that the nature of the right sued upon in product disparagement claims is proprietary, not personal. 222 Cal. Rptr. at 82 (citing *Richardson v. Allstate Ins. Co.*, 117 Cal. App. 3d 8, 12, 172 Cal. Rptr. 423 (1981); *Edwards v. Fresno Community Hosp.*, 38 Cal. App. 3d 702, 704, 113 Cal. Rptr. 579 (1974)). In product disparagement actions, the defendant has directed his false statement at the plaintiff's goods, rather than at the plaintiff's personal reputation. *Id.* (citing *Idaho Norland Corp. v. Caelter Indus., Inc.*, 509 F. Supp. 1070 (D. Colo. 1981); PROSSER & KEETON, *supra* note 1, § 128)).

In *Idaho Norland Corp. v. Caelter Indus., Inc.*, 509 F. Supp. 1070, 1071 (D. Colo. 1981), the court noted that among the jurisdictions that have considered what statute of limitations to apply to claims for product disparagement or trade libel, the authorities are split. The *Idaho Norland* court stated that a small majority of state courts have applied the libel and slander statute of limitations to trade libel and business disparagement claims. *Id.* (citing *Gee v. Pima County*, 126 Ariz. 116, 612 P.2d 1079 (1980); *Old Plantation Corp. v. Maule Indus.*, 68 So. 2d 180 (Fla. 1953); *Norton v. Kanouff*, 165 Neb. 435, 86 N.W.2d 72 (1957); *Buehrer v. Provident Mut. Life Ins. Co.*, 123 Ohio St. 264, 175 N.E. 25 (1931); *Woodward v. Pacific Fruit & Produce Co.*, 165 Or. 250, 106 P.2d 1043 (1940)). The court further noted that three federal district courts also have applied the libel and slander statute of limitations to disparagement actions. *Id.* (citing *Scott Paper Co. v. Fort Howard Paper Co.*, 343 F. Supp. 229 (E.D. Wis. 1972); *Lehigh Chem. Co. v. Celanese Corp. of America*, 278 F. Supp. 894 (D. Md. 1968); *Carroll v. Warner Bros. Pictures*, 20 F. Supp. 405 (S.D.N.Y. 1937)). Four states, including Texas, however, have refused to apply the libel and slander statute of limitations to disparagement claims. *Id.* (citing *King v. Miller*, 35 Ga. App. 427, 133 S.E. 302 (1926); *Reliable Mfg. Co. v. Vaughn Novelty Mfg. Co.*, 294 Ill. App. 601, 13 N.E.2d 518 (1938) (abstract opin.)); *see also Lase Co. v. Wein Prods., Inc.*, 357 F. Supp. 210 (N.D. Ill. 1973); *Vaccaro Constr. Co. v. A.J. Depace, Inc.*, 137 N.J. Super. 512, 349 A.2d 570 (1975); *Brown v. Freehold Land Mortgage Co.*, 97 Tex. 599, 80 S.W. 985 (1904) (malicious interference with business with intent to destroy business constitutes cause of action and falls outside scope of libel and slander statute of limitations).

C. *Distinguish Between the Libel Requirements of Personal Defamation and the Libel Remedy of Recovering Financial Losses*

Another defect in the *Jetco* court's reasoning further undermines its holding that Texas courts do not recognize actions for product disparagement. The *Jetco* court mistakenly determined that because the statements, if false, would injure the reputation of *Jetco* and its owner by subjecting them to financial injury, the claim properly fell within the libel statute.³⁰⁸ The statute permits recovery of financial losses only when the false statement injures a person's reputation and thereby causes such financial losses.³⁰⁹ The personal defamation, or injury to personal reputation, is an element of the action and a prerequisite to recovery of any damages.³¹⁰ The *Jetco* court recognized this requirement and discussed the fact that the statute affords no cause of action or libel for a business.³¹¹ The court cited *Newspapers, Inc. v. Matthews*³¹² for the proposition that the statement must defame the owner of a business, whether the owner is an individual or a corporation,³¹³ in order for the plaintiff to recover either nonfinancial or financial damages.³¹⁴ The *Jetco* court, however, failed to apply the requirement that in libel actions, financial injury must be a result of an injury to reputation. On the contrary, the court permitted recovery for libel when the injury to reputation results from the financial loss.³¹⁵

D. *Do Not Construe Product Disparagement Actions that also Involve Defamation as Actions for Defamation*

The court of appeals in *Gulf Atlantic* mistakenly held that a court must determine at the outset whether a complaint states a claim for disparagement or defamation.³¹⁶ Furthermore, the court of appeals erroneously concluded that if the claim primarily involves defamation, the court must rule only on that cause of action, and that if the plaintiff is unable to prove defamation, he may not recover for disparagement.³¹⁷

Justice Akin's dissent to the majority opinion of the court of appeals in *Gulf Atlantic* pointed out the obvious flaw in the majority's logic.³¹⁸ It is illogical to conclude that a product disparagement plaintiff who sufficiently pleads and proves his claim may not recover for disparagement if the facts of

308. See *Jetco*, 325 F. Supp. at 84.

309. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).

310. *Id.*

311. *Jetco*, 325 F. Supp. at 85.

312. 161 Tex. 284, 339 S.W.2d 890 (1960).

313. See *De Mankauski v. Ship Channel Dev. Co.*, 300 S.W. 118 (Tex. Civ. App.—Galveston 1927, no writ).

314. *Jetco*, 325 F. Supp. at 85 (citing *Matthews*, 339 S.W.2d at 893).

315. *Id.* at 84. In a product disparagement action, the defamation of the plaintiff is merely incidental to the disparagement of the product. *Royer v. Stooddy Co.*, 192 F. Supp. 949 (W.D. Okla. 1961). For a discussion of the elements for defamation and disparagement, see *supra* note 8 and text accompanying note 37.

316. *Gulf Atlantic*, 696 S.W.2d at 97-99.

317. *Id.* at 98.

318. *Id.* at 106 (Akin, J., dissenting).

the case indicate that the primary injury was defamation and the plaintiff is unable to recover for defamation because of insufficient proof or because of a bar on the claim by the statute of limitation. As Justice Akin noted, the plaintiffs have the responsibility and the freedom to assert whatever claim entitles them to relief.³¹⁹ It is not the court's duty to choose what theory the plaintiffs may argue.³²⁰ Indeed, courts may not limit the plaintiffs to one theory of recovery.³²¹ Upon its review of *Gulf Atlantic*, the Texas Supreme Court should have reversed the court of appeals' decision on this ground and adopted Justice Akin's dissenting opinion. Instead, the supreme court mistakenly agreed with the resolution of this question proposed by the majority.³²²

E. Recognize the Common Law Tort of Product Disparagement as Distinct from Slander of Title of Property

In decisions such as *Russell v. Campbell*³²³ and *Ward v. Gee*³²⁴ Texas courts have recognized a cause of action for slander of property.³²⁵ The slander of property action covers claims for slander of the quality of goods or property as well as for slander of title to real and personal property.³²⁶ Because product disparagement is virtually identical to slander of the quality of goods, Texas courts should recognize a cause of action for product disparagement as distinct from slander of property. Even the *Jetco* trial court opinion, which refused to recognize a claim stated as one for product disparagement, recognized that a product disparagement plaintiff could recover for slander of property.³²⁷ It seems illogical to permit recovery when the complaint characterizes the claim as one for slander of property, but to refuse to recognize claims characterized as actions for product disparagement, particularly since the elements of the two actions are identical. The seemingly arbitrary distinction between the two claims and the Texas courts' refusal to recognize claims stated in terms of trade libel or product disparagement are contrary to the underlying purpose of the Texas Rules of Civil Procedure,³²⁸ which free the plaintiff from pleading a specific cause of action.³²⁹ Texas courts, therefore, should recognize actions that are pleaded and proven as product disparagement claims.

319. *Id.* at 107.

320. *Id.*

321. *Id.*

322. *Gulf Atlantic*, 749 S.W.2d at 766-67.

323. 725 S.W.2d 739, 749 (Tex. App.—Houston [14th Dist.] 1987, no writ).

324. *Ward v. Gee*, 61 S.W.2d 555, 556 (Tex. Civ. App.—Eastland 1933, writ ref'd).

325. See *supra* text accompanying notes 217-20.

326. For a discussion of the elements of an action for slander of property, see *supra* notes 217-20 and accompanying text.

327. *Jetco*, 325 F. Supp. at 84.

328. Under the Texas Rules of Civil Procedure, a plaintiff need only make a short and plain statement of his claim showing that he is entitled to relief. TEX. R. CIV. P. 8(a). The purpose of the rule is to facilitate a decision on the merits, rather than on the characterization of the cause of action in the pleadings. See *Conely v. Gibson*, 355 U.S. 41 (1957) (discussing this purpose with respect to federal pleading).

329. See TEX. R. CIV. P. 8(a).

F. Recognize Product Disparagement Claims as Distinct From Business Disparagement Actions

In *Page v. Layne-Texas Co.*³³⁰ the court recognized that a plaintiff has a cause of action for business disparagement under Texas law if the defendant intended to interfere with the plaintiff's business despite the fact that the interference did not constitute statutory libel.³³¹ In *Gulf Atlantic Life Insurance Co. v. Hurlbut*³³² the Dallas court of appeals upheld the rule that disparagement of a business is actionable.³³³ Product disparagement claims, therefore, also should be actionable under Texas law because they are a form of intentional interference with business relationships.³³⁴

IV. CONCLUSION

No court has clearly recognized a cause of action for product disparagement under Texas law.³³⁵ Although Texas courts recognize claims for slander of property and business disparagement,³³⁶ Texas state courts and federal courts interpreting Texas law have refused to permit recovery for product disparagement. The Texas Supreme Court should acknowledge the distinction between defamation and disparagement actions. Accordingly, the court should permit recovery for common law product disparagement claims that do not constitute libel or slander within the definition of the Texas Civil Practice and Remedies Code.³³⁷ The court should recognize that the libel statute does not preclude recovery for common law product disparagement. Furthermore, product disparagement plaintiffs should have a cause of action under Texas law regardless of whether their cases also involve elements of defamation. The Texas Supreme Court should adopt the rationale of Justice Akin's dissent to the court of appeals' decision in *Gulf Atlantic*³³⁸ and apply that rationale to the tort of product disparagement, as Justice Akin applied it to business disparagement. Justice Akin's approach would permit plaintiffs to choose whether they seek to recover for defamation, disparagement, or both. In the event the Texas Supreme Court chooses not to recognize a separate cause of action for product disparagement, the court should recognize that product disparagement is an actionable form of interference with business relationships under *Page*.³³⁹ Moreover, the court should accept the theory that product disparagement is a derivation of slan-

330. 258 S.W.2d 366 (Tex. Civ. App.—Galveston 1953, writ diss'd by agr.).

331. *Id.* at 369.

332. 696 S.W.2d 83 (Tex. App.—Dallas 1985), *rev'd on other grounds and remanded*, 749 S.W.2d 762 (Tex. 1987).

333. 696 S.W.2d at 96 (citing *Page*, 258 S.W.2d at 369).

334. For a discussion of product disparagement as a form of tortious interference with economic relationships rather than as a form of defamation, see *supra* notes 2 and 9.

335. See *Cranberg*, 756 F.2d at 389 (uncertain whether Texas recognizes cause of action for product disparagement or trade libel).

336. See *Jetco*, 325 F. Supp. at 84 (recognizing cause of action for slander of title); *Gulf Atlantic*, 696 S.W.2d at 96 (recognizing cause of action for business disparagement).

337. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).

338. *Gulf Atlantic*, 696 S.W.2d at 369.

339. 258 S.W.2d at 369.

der of property, for which Texas courts have consistently permitted recovery.³⁴⁰ In evaluating its position on product disparagement liability in Texas, the Texas Supreme Court should consider that without a remedy for product disparagement, manufacturers and sellers will continue to suffer financial injury whenever others falsely disparage their products without personally defaming the owners of the business.

340. See *Jetco*, 325 F. Supp. at 84.